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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, *Appellants,*

v.

HENRY M. AUSTIN, L. D. BROWN, AND ROY ZIEGENGEIST, *Appellees.*

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF VIRGINIA

APPENDIX

List of Relevant Docket Entries

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND, COMMONWEALTH OF VIRGINIA

HENRY M. AUSTIN

vs.

OLD DOMINION BRANCH—496 NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL

Name of Paper——Date Filed

Motion for Judgment—June 24, 1970.

Proof of Service—June 30, 1970.

Demurrer—July 15, 1970.

Demurrer—July 17, 1970.

Notice—July 22, 1970.

Court's letter to counsel—December 30, 1970.

Order—January 21, 1971.

Court's letter to counsel—January 21, 1971.

Interrogatories—February 10, 1971.

Order—February 22, 1971.

Answers to Interrogatories—March 12, 1971.

Answer to Motion for Judgment—March 17, 1971.

Answer to Motion for Judgment—March 17, 1971.

Supplement to Interrogatories—March 18, 1971.

Interrogatories—March 25, 1971.

Interrogatories—June 16, 1971.

Order—June 10, 1971.

Interrogatories—June 16, 1971.

Answers to Interrogatories—June 16, 1971.

Order—June 29, 1971.

Copy of order with return—June 29, 1971.

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[1] We have been advised by the Clerk of the Supreme Court of Virginia that it does not have a docket as such. We have therefore printed a certified list of the orders entered by that court in these proceedings.

Request under Rule 4:9(b)—April 26, 1971.
Subpoena Duces Tecum
Affidavit—April 23, 1971.
Subpoena Duces Tecum
Order—July 1, 1971
Order—July 2, 1971
Copy of order of 7-2-71
Jury Verdict
Notice—July 7, 1971.
Certificate of Bond—July 27, 1971.
Notice of Appeal and Assignments of Error—August 16, 1971.
Notice—August 18, 1971.

In the Law and Equity Court of the City of Richmond, Commonwealth of Virginia

L. D. Brown

vs.

Old Dominion Branch—496 National Association of Letter Carriers, AFL-CIO, et al

Name of Paper——Date Filed
Motion for Judgment—July 2, 1970.
Proof of Service—July 28, 1970.
Demurrer—July 28, 1970.
Order—January 21, 1971.
Court's letter to counsel—January 21, 1971.
Interrogatories—February 10, 1971.
Order—February 22, 1971.
Interrogatories—March 10, 1971.
Answer to Motion for Judgment—March 17, 1971.
Answer to Motion for Judgment—March 17, 1971.
Answers to Interrogatories—April 9, 1971.

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND, COMMONWEALTH OF VIRGINIA

ROY P. ZIEGENGEIST

vs.

OLD DOMINION BRANCH—496 NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL

IN THE
SUPREME COURT OF VIRGINIA

Record No. 7917

Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, *Plaintiffs in error,*
against
HENRY M. AUSTIN, *Defendant in error.*

IN THE
SUPREME COURT OF VIRGINIA

Record No. 7918

Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al., *Plaintiffs in error,*

against

L. D. BROWN, *Defendant in error.*

Order granting writ of error and supersedeas—entered January 12, 1972.

Mandate—entered November 27, 1972.

Order staying execution of judgment—entered December 22, 1972.

IN THE
SUPREME COURT OF VIRGINIA

Record No. 7919

Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al., *Plaintiffs in error,*

against

ROY P. ZIEGENGEIST, *Defendant in error.*

Order granting writ of error and supersedeas—entered January 12, 1972.

Mandate—entered November 27, 1972.

Order staying execution of judgment—entered December 22, 1972.

Opinion Below

The opinion of the Supreme Court of the State of Virginia in these proceedings is reproduced as an Appendix to the Jurisdictional Statement at pp. 1a-11a.

NOTE: THE MOTIONS FOR JUDGMENT IN ALL THREE CASES WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED BELOW.

[Caption omitted in printing]

Motion for Judgment

The plaintiff, Roy P. Ziegengeist, moves the Court for a judgment against the defendants, Old Dominion Branch #496, National Association of Letter Carriers AFL-CIO and The National Association of Letter Carriers, for the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00), to wit: FIFTY THOUSAND DOLLARS ($50,000.00) as compensatory damages and FIFTY THOUSAND DOLLARS ($50,000.00) as punitive damages for the following:

1. That on or about June 5, 1970 and prior thereto the defendant was an unincorporated association, Old Dominion Branch #496, National Association of Letter Carriers AFL-CIO, being associated as a labor union with the defendant, National Association of Letter Carriers, affiliated with the AFL-CIO and having as its membership letter carriers of the United States Postal Service in the Richmond, Virginia area, the AFL-CIO being a national labor organization of which the defendant, Old Dominion Branch #496, was a part.

2. That on the date aforesaid and prior thereto said defendant, Old Dominion Branch #496, National Association of Letter Carriers AFL-CIO, had organized the letter carriers in the Richmond, Virginia area and was the bargaining agent for said carriers and that said defendant was actively promoting said union activities and soliciting and attempting to compel all letter carriers to affiliate with the defendant's union.

3. That the plaintiff, Roy P. Ziegengeist, had exercised his right as an employee of the United States Government Postal Service not to affiliate with or become a part of said defendant's union.

4. That the defendant, Old Dominion Branch #496, with the knowledge and consent of the defendant, the National Association of Letter Carriers, did act maliciously and with

the intent by unlawful means, coercion and activity to compel the plaintiff to become a part of said union and intending maliciously to harm and injure the plaintiff in his good name and reputation for his refusal and to force and compel him to join said defendant union in violation of his rights as an American citizen and as an employee of the United States Government and embarked on a deliberate scheme and plan to defame the plaintiff in his good name and reputation and to hold him up to public ridicule as a means of accomplishing its illegal and unlawful purpose.

5. That on or about said June 5, 1970, the said defendants maliciously, recklessly and wickedly in furtherance of their unlawful purpose and scheme to compel the plaintiff, Roy P. Ziegengeist, to join their union published and distributed in the union newspaper and newsletter and distributed the same through the United States Mail to all union members slanderous and libel statements concerning the plaintiff, to-wit:

"The Scab

"Some co-workers are in a quandary as to what a scab is; we submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which he made a scab.

"A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue.

Where others have hearts, he carries a tumor of rotten principles.

"When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of Hell to keep him out.

"No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

"Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

"Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

"LIST OF SCABS

"Henry Austin
Lewis Bolton
E. D. Brown
L. D. Brown
R. L. Broughman
R. L. France
Roger Hanson
Randolph Jacobs
Richard Leonard
F. E. Moriconi
Judson Proctor
Wilford Tevis
Hunter Whitlock
R. L. Worsham
R. P. Ziegengeist"

6. That the aforesaid statements published of and concerning the plaintiff are slanderous and insulting and were falsely and maliciously made and were published by the defendants as aforesaid and said words and accusations were per se slanderous and libelous to the damage of the plaintiff and were words which from their usual construction and common acceptation are construed as insulting and tending to violence and breach of the peace.

7. As a result of the aforementioned illegal, malicious, insulting, wicked, defamatory and slanderous statements as aforesaid published by the defendants, acting through their duly authorized agents, servants and employees, the said defendants have caused the said plaintiff, Roy P. Ziegengeist, to suffer humiliation, mortification, shame, vilification and exposure to public infamy and scandal, injury to his reputation and feelings and harm in his job and employ-

ment and financial loss, which injuries will so continue permanently.

WHEREFORE, the plaintiff demands judgment against the aforesaid defendants and each of them in the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00), namely, FIFTY THOUSAND DOLLARS ($50,000.00) as compensatory damages and FIFTY THOUSAND DOLLARS ($50,000.00) for punitive damages, as well as court costs.

ROY P. ZIEGENGEIST
By /s/ Stephen M. Kapral
Counsel

/s/ Stephen M. Kapral
DEAL AND KAPRAL
4510 South Laburnum Avenue
Richmond, Virginia 23231

NOTE: THE DEMURRERS IN ALL THREE CASES WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED BELOW.

[Caption omitted in printing]

Demurrer

COMES the Defendant, The National Association of Letter Carriers, demurring to the Motion for Judgment filed herein, and says that said Motion for Judgment is not sufficient in law.

THE NATIONAL ASSOCIATION OF
LETTER CARRIERS

By /s/ Israel Steingold
819 Citizens Bank Building
Norfolk, Virginia 23514

and
Mozart G. Ratner
818 - 18th Street, N.W.
Washington, D.C.

Order Overruling Demurrer

LAW AND EQUITY COURT OF THE CITY OF RICHMOND
Richmond, Virginia
23219

Judges
Robert Lewis Young
Alex H. Sands, Jr.
A. Christian Compton

Clerk
Luther Libby, Jr.

January 21, 1971

Parker E. Cherry, Esquire
1012 Mutual Building
Richmond, Virginia

Stephen M. Kapral, Esquire
Deal and Kapral
4510 South Laburnum Avenue
Richmond, Virginia 23231

Israel Steingold, Esquire
Steingold, Steingold & Chovitz
819 Citizens Bank Building
Norfolk, Virginia 23514

Mozart G. Ratner, Esquire
818 - 18th Street, N.W.
Washington, D.C.

Gentlemen:

Enclosed you will find a copy of each order entered today in each of the above three cases overruling the demurrers filed therein. Each order sets the time within which the defendants shall file their grounds of defense.

Since the case is before the Court upon demurrer, the manner in which the Court must consider the allegations of

the Motion for Judgment upon the demurrer should be reviewed. The rule is fully stated in *Ames* v. *American National Bank*, 163 Va. 1 (1934), at pages 37 and 38 as follows:

> "A demurrer admits that all material facts which are well pleaded are true. Facts well pleaded, and therefore admitted, are (a) facts expressly alleged, (2) facts which are by fair intendment impliedly alleged, and (3) facts which may be fairly and justly inferred from the facts alleged. Facts sufficiently alleged must be taken as true (unless they are inherently impossible, or contradicted by other facts pleaded) even though the court may be of opinion that it is improbable that they are true. And all reasonable inferences of fact which a trier of facts may fairly and justly draw from the facts alleged must be considered by the court in aid of the pleading. But the demurrer does not admit the correctness of the conclusions of law stated by the pleader, or that the inferences of fact drawn by the pleader from facts alleged may be fairly and justly drawn therefrom."

The respective plaintiffs here allege that on or about June 5, 1970 the defendant local, a branch of the defendant national association, had as its membership letter carriers of the United States Postal Service in the Richmond area; had organized the letter carriers in the Richmond area; and, were the bargaining agents for said carriers. It is further alleged that said defendants were actively promoting union activity and soliciting and attempting to compel all letter carriers to associate with the defendant organizations; that each plaintiff had chosen not to affiliate with the union; that the defendants, acting maliciously and with intent to harm and injure the plaintiff in his good name and reputation, embarked on a deliberate scheme and plan to defame the plaintiff and to hold him up to ridicule by his

fellow employees and by the public, caused to be published on or about June 5, 1970 in a union newspaper or newsletter defamatory and insulting statements concerning the plaintiff, specifically naming and identifying him.

It is further alleged that the defamatory statement which purports to define a "scab," was maliciously made and caused the plantiff injuries and damages. In each case the plaintiff seeks recovery in compensatory and punitive damages.

The defendants demur on two main grounds. First, they assert that the publication complained of is protected against a state court action for damages by the freedom of speech guarantee of the First Amendment to the Constitution of the United States as incorporated in the due process clause of the Fourteenth Amendment; and, second, the publication complained of is protected against a state court suit for damages by Executive Order 11491, effective January 1, 1970. 3 C.F.R. 191 (1969).

At the outset it should be noted that the Court is treating each of these actions as being brought under the Virginia statute for insulting words (Code § 8-630, Code of Virginia of 1950, as amended) and not as a blend of the common law action for libel and of the statutory action for insulting words, since it is a well-settled principle of law that such actions cannot be properly joined in the same count of a Motion for Judgment. *Sun Life Assurance Co.* v. *Bailey,* 101 Va. 443, 446 (1903); *Payne* v. *Taneil,* 98 Va. 262, 266 (1900); Burks Pleading and Practice, Section 165 pp. 270, 271 (4th Ed.); 12 M.J., *Libel and Slander,* § 39, page 43, ftns. 1 and 2. Furthermore, since it appears that the Motions for Judgment herein are intended to be brought under the statute for insulting words, the pleadings are not defective because a publication containing insulting words may be declared on under the statute, although libelous at common law. *Ibid.*

The Virginia statute for insulting words reads as follows:

> "All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable."

Prior to 1940, the aforesaid statute contained this additional sentence: "No demurrer shall preclude a jury from passing thereon." By amendment in that year the demurrer prohibition was eliminated and now the court has the same power over the statutory action as it enjoyed over common law actions for libel and slander. This being the case, a brief review of the nature of the statutory action under Virginia law is in order. Thereafter the effect, if any, of the federal law upon the state law will be considered.

In *Carwile* v. *Richmond Newspapers, Inc.*, 196 Va. 1 (1954), it is stated at page 6 as follows:

> "An action for insulting words under Code, § 8-630 is treated precisely as an action for slander or libel, for words actionable *per se*, with one exception, namely, no publication is necessary. The trial of an action for insulting words is completely assimilated to the common law action for libel or slander. *Darnell* v. *Davis*, 190 Va. 701, 58 S.E. (2d) 68; *W. T. Grant Co.* v. *Owens*, 149 Va. 906, 141 S.E. 860; *Guide Pub. Co.* v. *Futrell*, 175 Va. 77, 7 S.E. (2d) 133....
>
> "At common law defamatory words which are actionable *per se* are: (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Those which impute that a person is infected with some contagious disease, which if the charge is true, it would exclude the party from society. (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment.

(4) Those which prejudice such person in his or her profession or trade. All other defamatory words which, though not in themselves actionable, occasion a person special damage are actionable....

"(2) Although varying circumstances often make it difficult to determine whether particular language is defamatory, it is a general rule that allegedly defamatory words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used. In order to render words defamatory and actionable it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory. Accordingly, a defamatory charge may be made by inference, implication or insinuation. *James* v. *Powell,* 154 Va. 96, 152 S.E. 539; *Moss* v. *Harwood,* 102 Va. 386, 46 S.E. 385; 53 C.J. S. §§ 9, 10, pp. 46, 47."

See also 50 Am. Jur. 2d *Libel and Slander,* § 20, p. 532.

The Court must determine, considering the allegations made in the respective motions for judgment under the rules applicable to a demurrer, whether the words in question could be considered and construed by fair-minded men as insulting and tending to violence and breach of the peace. If they can be so reasonably construed, then they are actionable under the statute unless the occasion was one of privilege. *Darnell* v. *Davis,* 190 Va. 701, 706 (1950). See also 45 Va. L. Rev. 772, 774.

The words in question which are specifically directed to each plaintiff are insulting and tend to violence and breach of the peace. It would serve no purpose here to take each sentence of the statement and point out the actionable language therein. Suffice it to say, that the entire "definition"

of a "scab" is actionable under the Virginia statute for insulting words.

It having been determined that the statement is actionable, the question of privilege should be considered.

In 12 M. J. *Libel and Slander,* page 59, *et seq.,* the following instructive discussion of privilege is found:

> "Privileged communications are of two kinds, those absolutely privileged and those qualifiedly privileged. Defamatory words cannot constitute a privileged communication or publication unless the occasion upon which they are used is either absolutely or qualifiedly privileged. A 'privileged communication' or statement, in the law of libel and slander, is one which, except for the occasion on which or the circumstances under which it is made, would be defamatory and actionable. A privileged occasion, as used in cases of defamation, strictly speaking, is confined to an occasion in which the party using the language of which complaint is made had communicated the same to another party to whom he owes a duty. That is, the occasion is such that one or more members of the public are clothed with greater immunity than others. And one is not liable in damages for privileged communications, where the use of the privileged occasion is bona fide.
>
> "The rule as to privileged communications applies as well to actions under the statute of insulting words as to common-law actions of libel and slander.
>
> "The test to be applied upon a plea of privilege is the relevancy and pertinency of the alleged offending language to the matter in inquiry, whether an action for the recovery of damages is brought upon a charge of slander or upon a charge of libel.
>
> ". . . Absolute privilege relates to proceedings of legislative bodies, judicial proceedings, military and naval officers, and other acts of the government itself.

• • • • • • • •

"... The proper meaning of a qualified privilege is only this: That the occasion, on which a communication is made, refutes the inference prima facie, arising from a statement prejudicial to the character of the plaintiff, and puts the onus upon the plaintiff to prove actual malice or malice in fact. Qualified privilege, as that term is used in the law of libel, carries with it the suggestion that the publication is objectionable in certain circumstances, and would be actionable but for the peculiar conditions under which it was made. In order for a plea of qualified privilege to be good, it must show that the defendant published the alleged libel believing it to be true, and to persons to whom he either owed a duty, or who were jointly interested with him in the matter sought to be protected by the publication. A defendant cannot claim that a libel published promiscuously to all persons is privileged, unless he owed a duty to the general public which he sought to perform by the publication. If the occasion is only qualifiedly privileged, three things must concur to render the communications or publication privileged (that is, to establish the defense of privilege): (1) the occasion upon which the words are used must be privileged; (2) the words used must not transcend the scope of the privilege of the occasion; and (3) the words must be used in good faith, without actual malice. The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only."

See also *Elder* v. *Holland,* 208 Va. 15 (1967), and *Story* v. *Newspapers, Inc.,* 202 Va. 588 (1961).

It is generally recognized that a qualified privilege attaches to statements and communications made in connection with the various activities of labor unions so long as

they act without malice and are not actuated by improper motives. 50 Am. Jur. 2d *Libel and Slander,* § 206, page 715. Upon the trial of these cases, it may develop that the facts will support a defense of qualified privilege in which case the burden will be upon the plaintiff to prove that the defendants have abused the privilege. That burden will require the plaintiff, of course, to prove that the defendants published the objectionable matter with actual malice or that the scope of the privilege was exceeded in some other manner such as by use of language disproportionate to the occasion. 45 Va. L. Rev. at 781 and 782. See also *R. H. Bouligny, Inc.* v. *United Steelworkers of America* (N.C. 1967), 154 S.E.2d 344; 150 A.L.R. 932, supplemented in 19 A.L.R.2d 694. Even assuming that these motions for judgment state facts which show the existence of a conditional privilege, nevertheless, the pleadings sufficiently allege an abuse of that privilege.

Now, considering the allegations in the pleadings in the light of the state law on the subject, the impact of the federal law must be evaluated. Under the facts alleged, the federal cases have no real effect upon our state law on the subject. The Supreme Court of the United States has clearly held that state remedies may be applied where a party to a labor dispute circulates false and defamatory statements during a union organizing campaign upon allegation and proof that the statements were made with malice and resulted in damage of the plaintiff. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966). Such availability of state remedies is restricted "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." 15 L. Ed. 2d 591. Such damages "may include injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law." *Ibid.* This is but another way of saying under Virginia law that if a qualified privilege exists

here, the plaintiff must prove abuse of that privilege. *New York Times* v. *Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 at page 1435 (1964). See also Currier, Defamation in Labor Disputes: Preemption and The New Federal Common Law, 53 Va. L. Rev. 1 (1967).

The defendants recognize the above-stated application of the federal law in state courts, but in taking the position that the statement in question is not actionable, they argue that the words are mere vituperation and hyperbole which are common parlance in labor disputes; and, that such comments are mere expressions of opinion rather than misrepresentations of fact. Neither position is well taken upon demurrer. Accusing the plaintiffs of having "rotten principles," of lacking "character," and of committing the crime of treason (Code, Section 18.1-418) may be construed as statements of fact which from their usual construction and common acceptation in the circumstances under which they are uttered are susceptible of being defamatory. Whether they are in fact actionable will depend upon the evidence. *Zayre, Inc.* v. *Gowdy,* 207 Va. 47, 50 (1966); Restatement of Torts, Section 563, comment 3. The case of *Greenbelt Coop. Pub. Assoc.* v. *Bresler,* 398 U.S. 6, 26 L. Ed. 2d 6, 90, S. Ct. ____ (1970), relied upon by the defendants, is not authority for a contrary conclusion. There is a vast difference between the use of "blackmail" in describing Bresler's activities there and the use of the words in question directed to these plaintiffs under the circumstances alleged. Unless the meaning intended is free from doubt, it is for the jury and not the Court to determine the construction of the alleged defamatory language.

The defendants also argue that the motions for judgment are fatally defective for several reasons, the first being that certain specific details of fact are omitted. As previously stated, the allegations are sufficient to state a cause of action in each case under the Virginia statute. If the defendants feel the pleadings are incomplete and fail to fairly inform

them of the true nature of the claim, the defendants' relief is by motion for a bill of particulars and not by demurrer. Rule 3:18(d).

Next, the defendants argue that there must be "'proof that the words had a defamatory meaning'" citing *Linn*. The Court agrees with that position and has held that the pleadings furnish a sufficient basis for such proof.

Finally, the defendants argue these words which do not tend to *immediate* violence and which do not raise a "clear and present danger" to breach of the peace are constitutionally protected. The cases relied upon by the defendants fail to support that proposition as applied to the words in question here. See particularly *Youngdahl* v. *Rainfair*, 355 U.S. 131, 2 L. Ed. 2d 151, 156, 78 S. Ct. 206 (1957), involving the use of "scab" by strikers.

In summary, the Court holds that these motions for judgment are sufficient in law even considering the impact of the federal law upon the law of this state on this subject. However, it should be stated also that while the law of Virginia applies to publications of a labor union which are relevant to and in the course of a campaign to organize federal employees, nevertheless the union (depending, of course, upon the evidence) is usually afforded the protection of a qualified privilege. Therefore, the ultimate burden upon these plaintiffs will probably be to prove that the statement in question was uttered with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

For these reasons, the demurrers are overruled.

Very truly yours,

/s/ A. CHRISTIAN COMPTON, *Judge*

ACC/jat
Enclosure

NOTE: THE ANSWERS FILED BY OLD DOMINION BRANCH 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO IN ALL THREE CASES WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED BELOW.

[Caption omitted in printing]

Answer to Motion for Judgment for Defendant Old Dominion Branch 496, National Association of Letter Carriers, AFL-CIO

Comes now the defendant, Old Dominion Branch 496, National Association of Letter Carriers, AFL-CIO, and, in answer to the Motion for Judgment states as follows:

1. Admits that National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "NALC") is a national labor organization; that defendant Old Dominion Branch 496 (hereinafter referred to as Branch 496) is a branch of NALC; and that Branch 496 admits to membership letter carriers in the Richmond area. Further answering, defendant Branch 496 asserts that it is an autonomous local labor organization, which conducts its own affairs through its own officers, elected by its own membership, and that its affairs are governed by its own independent Constitution and Bylaws, and resolutions, customs and practices pursuant thereto. The Secretary of Branch 496 writes, edits and publishes the Branch's own newsletter, without any authorization, direction, consultation, supervision or participation therein by NALC or any officer or agent thereof.

2. Admits that on the dates mentioned, and at all relevant times, a majority of the letter carriers in the Richmond area were members of Branch 496 and that defendants NALC and Branch 496 were and are the exclusive bargaining agents of all letter carriers in the aforesaid area. Admits that at all relevant times defendants were actively engaged in representing all letter carriers in the Richmond area, non-members as well as members of Branch 496, in

collective bargaining, grievance adjustment, adverse actions, and other matters affecting wages, hours and working conditions *vis-a-vis* their employer, the Post Office Department, as they were required to do by federal law. Admits that defendant Branch 496 was, at all relevant times, and still is, "soliciting" all letter carriers in its territorial jurisdiction to join or affiliate with Branch 496, but denies that defendant NALC, or any of its officers or agents, were or are engaged in such solicitation. Denies that defendant Branch 496 or defendant NALC was or is "attempting to compel," any letter carrier to affiliate, and affirmatively alleges that defendant Branch 496 was and is exercising its constitutional and federal legal rights to persuade non-members to join.

3. Admitted.

4. Denied.

5. Defendant states that Angelo Parker, Secretary of defendant Branch 496, caused to be printed in the Branch 496 newsletter the article which plaintiff claims is defamatory; that the entire text of said article is a world renowned literary classic written long ago by the famous American novelist, Jack London, now deceased; and that said article has been reprinted thousands of times by countless labor organizations, with reference to persons eligible for union membership who refuse to join the organization or who otherwise participate in activity deemed detrimental to its interests or the interests of its membership as a whole, or of its constituency. Defendant Branch 496 further states that Mr. Parker considered the article complained of applicable to plaintiff and to the other non-members of Branch 496 whose names appear below the article because of their deliberate, wilful and malicious refusal to join and become or remain members of Branch 496, which refusal, in his opinion, was designed to and did enable them unjustly to profit at the expense of Branch 496 and which, in his opinion, imposed and imposes undue and unequitable finan-

cial and other burdens on the membership of Branch 496. Defendant denies that said article was published with the knowledge and consent of defendant NALC, and in all other respects, the allegations are denied.

6. Denied.

7. Denied.

Affirmative Defenses

Further answering, Branch 496 asserts that this Honorable Court lacks jurisdiction of the subject matter of this action because:

1. The publication complained of is protected against plaintiff's damage suit by the Fourteenth Amendment of the Constitution of the United States, insofar as said amendment incorporates and absorbs the freedom of press guarantee of the First Amendment.

2. The aforesaid publication is protected against plaintiff's damage suit by the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, which is applicable thereto by virtue of Executive Order 11491, October 29, 1969, 34 F.R. 17605.

3. The Virginia Statute for insulting words, Code § 8-630, Code of Virginia of 1950, as amended, pursuant to which, it has been held, this complaint is brought, is unconstitutional both on its face and as construed and applied to the complaint herein in the letter opinion of the court dated January 21, 1971:

(a) Said statute is void because it forbids publication of constitutionally protected words and utterances; because it is overbroad and unduly vague; and because it exerts a chilling effect upon freedom of speech and of the press, all in violation of the due process clause and freedom of speech and press guarantees of the Fourteenth Amendment; and

(b) Said statute encroaches severely upon freedom of speech and of the press in labor disputes, in violation of

the Fourteenth Amendment, of Executive Order 11491, and of the Supremacy Clause.

4. If, contrary to the aforesaid defenses, the aforesaid publication is in fact and in law not constitutionally protected and is subject to a state court suit for damages, defendant Branch 496 is not liable therefore because it did not actually authorize, participate in or ratify publication of this or any other article which was, or should have been, known to contain falsehoods or unlawful words.

Respectfully submitted,

ISRAEL STEINGOLD
819 Citizens Bank Building
Norfolk, Virginia 23514

MOZART G. RATNER
818 - 18th Street, N.W.
Washington, D.C. 20006

March 15, 1971

NOTE: THE ANSWERS FILED BY NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO IN ALL THREE CASES WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED BELOW.

[Caption omitted in printing]

Answer to Motion for Judgment for Defendant National Association of Letter Carriers, AFL-CIO

Comes now the defendant, National Association of Letter Carriers, AFL-CIO, and, in answer to the Motion For Judgment states as follows:

1. National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "NALC") admits that it is a national labor organization. Old Dominion Branch 496, National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Branch 496") is an autonomous local labor organization affiliated with the National Association, which admits to membership letter carriers in the area of Richmond, Virginia. Branch 496 conducts its own affairs through its own officers, duly elected by its own membership, and pursuant to its own Constitution and Bylaws, and resolutions, customs and practices enacted or adopted pursuant thereto. NALC exercises no authority over the internal affairs of Branch 496 except to the extent described in the Constitution and Bylaws of NALC.

2. Denied.

3. Admitted.

4. Denied.

5. Denied. Further answering, defendant NALC states that neither it, nor any of its officers or agents, directly or indirectly, authorized, was consulted about, or in any way participated in or ratified, the publication complained of.

6. Denied.

7. Denied.

Affirmative Defenses

Further answering, NALC asserts that this Honorable Court lacks jurisdiction of the subject matter of the action because:

1. The publication complained of is protected against plaintiff's damage suit by the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, which is applicable hereto by virtue of Executive Order 11491, October 29, 1969, 34 F.R. 17605.

3. The Virginia Statute for insulting words, Code § 8-630, Code of Virginia of 1950, as amended, pursuant to which, it has been held, this complaint is brought, is unconstitutional both on its face and as construed and applied to the complaint herein in the letter opinion of the Court dated January 21, 1971:

a. Said statute is void because it forbids publication of constitutionally protected words and utterances; because it is overbroad and unduly vague; and because it exerts a chilling effect upon freedom of speech and of the press, all in violation of the due process clause and freedom of speech and press guarantees of the Fourteenth Amendment;

b. Said statute encroaches severely upon freedom of speech and of the press in labor disputes, in violation of the Fourteenth Amendment, of Executive Order 11491, and of the Supremacy Clause.

4. If, contrary to the aforesaid defenses, the aforesaid publication is in fact and in law not constitutionally protected and is subject to a state court suit for damages, defendant NALC is not liable therefore because it did not ac-

tually authorize, participate in or ratify publication of this or any other article which was, or should have been, known to contain falsehoods or unlawful words.

Respectfully submitted,

ISRAEL STEINGOLD
819 Citizens Bank Building
Norfolk, Virginia 23514

MOZART G. RATNER
818 - 18th Street, N.W.
Washington, D.C. 20006

March 15, 1971

Transcript of Proceedings

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND VIRGINIA:

HENRY M. AUSTIN, L. D. BROWN, ROY P. ZIEGENGEIST

v.

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, an Unincorporated Association,

and

THE NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

TRANSCRIPT of the evidence and other incidents of the above when heard on July 1 and 2, 1971, before Honorable A. Christian Compton, Judge, and a jury.

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[38] JOHN OVERBY, JR., called at the instance of counsel for the plaintiffs, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHERRY:

Q. Will you state your name, residence and occupation. A. John Overby, Jr. I live at 1607 Pulliam Road, Bon Air, and operate the Ben Franklin Printing Company.

Q. As the Ben Franklin Printing Company, do you publish the Carrier's Corner for the Local Union here, Postal Union? A. Yes, sir, I do.

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[45] CROSS EXAMINATION

BY MR. RATNER:

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[47]Q. To whom do you send the bill for printing Carrier's Corner? A. The bill is sent to Old Dominion Branch No. 496.

Q. Have you ever sent a bill to the National Association of Letter Carriers in Washington, D.C.? [48] A. I don't recollect having sent a bill there, no, sir.

Q. Has any officer, agent, or person identifying himself as an officer or agent of the National Association of Letter Carriers in Washington, D.C. ever authorized you or instructed you to print Carrier's Corner? A. Not to my knowledge, no, sir. No one of the Washington Region.

Q. Were you ever instructed to send a copy of any proofs to Washington or to any officer of the National Association of Letter Carriers before printing Carrier's Corner? A. No, sir.

Q. Did, in fact, you ever do so? A. No, sir.

Q. How many copies of Carrier's Corner do you print each month? A. 575 copies.

Q. Did you print any more copies of any particular issue between January, 1970 through September, 1970, than you did at any other time? A. No, sir.

Q. The same number of copies? A. Yes, sir.

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[49] REDIRECT EXAMINATION

BY MR. CHERRY:

Q. Mr. Overby, will you look at the face of Carrier's Corner. Look on your left-hand side there, at the seal there. Whose seal is that on there? A. This one on the left on the front, sir?

Q. Yes. A. The National Association of Letter Carriers.

Q. So it is published with the seal of the National Association of Letter Carriers? A. That is correct.

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[50]JOHN W. NETHERLAND, called at the instance of counsel for the plaintiffs, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHERRY:

Q. Mr. Netherland, what is your name and occupation? A. John W. Netherland, Director of Operations for the Richmond Post Office.

Q. Now did you last—or the early part of last summer or spring have occasion to discuss some publication with any of the carriers? A. Yes, sir.

Q. Who was that carrier? A. His name was Austin.

Q. What was the circumstances under which you discussed it? A. He approached me with a copy of the pamphlet or bulletin or whatever you might call it, journal, and he objected to an article that appeared in there using his name. The name appeared in the article.

Q. Did you go to the Postmaster? A. He came to me with a complaint about it [51] and I advised him that it was a matter beyond my responsibility and something which concerned he and his organization and that I would take no action, and I advised him to see the postmaster.

Q. That was your extent of it. He registered a complaint with you? A. Right.

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[52]LAWRENCE HUTCHINS, called an adverse witness by counsel for the plaintiffs, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAPRAL:

Q. You are Wayne Hutchins? A. Lawrence Hutchins.

Q. Lawrence Hutchins. I direct your attention back to the time of June, 1970, when this alleged article was printed, what was your position with the Local No. 496 Branch of the Letter Carriers at the time the article was

published? A. At the time the article mentioned by you was printed I was President of the Local Branch No. 496.

Q. Is it not true that the Local Branch No. 496 is affiliated with the National Association of Letter Carriers AFL-CIO? A. Local Branch No. 496 is affiliated with the National Association of Letter Carriers AFL-CIO as the National Association constitution calls for affiliation, and in that regard we are.

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[53] By Mr. Kapral: (Continuing)

Q. Mr. Hutchins, what benefits do Local No. 496 derive from the National Association of Letter Carriers? [54] A. Local No. 496 derives such benefits as representation in the Halls of Congress through a lobbying procedure and dissemination of information gained by the National Office through their travel and through their training, through oral and written communications.

Q. That is the only benefits that are received? A. As I can really recall.

Q. Now being a member of the Local Branch No. 496 of the National Association of Letter Carriers, is it not true that dues are collected by the Local Branch each pay period? A. No, sir, that is not true.

Q. Are dues collected? A. Yes, sir, through a payroll deduction system.

Q. How often? A. Every month.

Q. Once a month? A. Yes, sir.

Q. You were President of the Local Branch No. 496 in June, 1970. Answer me this question. These dues collected each month, how much of these dues are sent to the National Association in Washington?

MR. RATNER: Your Honor, I object. The [55] relationship between the dues, the part retained or refunded by the National Association to each Local, is definitely set out in the constitution of the National Association of Letter Carriers and governed thereby.

THE COURT: Is there any dispute to that fact?

MR. RATNER: None whatsoever. The fact is clear.

THE COURT: Well then what is the harm of having this witness testify, or you stating what the constitution provides, if that fact is desired to be brought to the jury?

MR. RATNER: I withdraw the objection.

BY MR. KAPRAL: (Continuing)

Q. I believe you stated, Mr. Hutchins, that each month dues are collected here in the Local Old Dominion Branch No. 496 from each member? A. No, sir.

Q. On a payroll deduction? A. Right.

Q. I am asking you this question in addition, each month from this payroll deduction from each member, the amount of money taken in payroll deduction from each member, the amount of money taken in payroll deduction for [56]dues, how much is allocated to the National Association of Letter Carriers in Washington, D.C.? A. The money is deducted from the Union membership when the checks are made, which is in the Data Center, Atlanta, Georgia. They collect the amount of money from the Union membership dues and send the remittance to the National Association in Washington, and they in turn deduct their portion of the dues and remit to us the remaining balance.

Q. Your answer is that a certain amount is allocated each month to the National in Washington, D.C. Is that your answer? A. Yes.

Q. Now let me ask you something, Mr. Hutchins, when a member here in Virginia joins Local No. 496 of the National Association of Letter Carriers then he automatically becomes a member of the National Association of Letter Carriers? A. Not all the time. There is a process that has to take place which puts him on the roles.

Q. Would you explain that? A. The Local secretary has to complete a form. The form is submitted to Washington and based upon a dues structure, if his dues are paid six months, then he is a qualified member of the National Association of Letter [57]Carriers.

Q. Didn't you say before that dues are taken from the payroll all the time? A. First his name has to be submitted to the Data Center and then as the process evolves the National retains its portion, after the Local has sent proper notification to the National.

Q. Are you still President? A. Yes.

Q. Being President, you should be able to answer this. Do you know of any case here at the Local level, Old Dominion Branch, where a person who became a member of Local No. 496 was not admitted to the National Association? A. No, I don't.

Q. You don't know of any case like that? A. No.

Q. Once you join the Local Branch, No. 496, and this six months period as you mentioned, or trial period passes and you are admitted to the National Association of Letter Carriers, what type card do you receive? A. You receive a card from the Local Branch secretary with the following, To Whom It May Concern he is a member of the National Association of Letter Carriers, and the Local Branch stipulated in the provided case.

[58]Q. Do you have your card with you today, sir? A. I may have.

Q. Would you produce the card? A. If I have it I will be glad to. [Looking through wallet] Here it is.

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Q. You know Mr. Ziegengeist. To to the best of your knowledge has anyone in your Union, member or officer, ever apologized to any one of these three gentlemen and told them they were sorry for what was published or said about them? [59]A. The best I can answer, no.

Q. Now you are President of the Union. Have you ever apologized to any one of these gentlemen? A. For what?

Q. This alleged libelous article, these things written about these gentlemen? A. No, sir, I have not.

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[62]Q. Referring your attention back again to the article printed in June, 1970, did you know at this time that this

article was going to be printed about these gentlemen? A. Did I know that the article was going——

Q. Did you know that this article was going to appear in the June 1970 issue? A. Yes.

Q. You knew that? A. Yes.

Q. Do you know yourself that Mr. Henry Austin and Mr. Brown and Mr. Ziegengeist, do you know that all three of them or any one of them have rotten principles? A. I do not know the individuals to that extent to really describe their principles.

Q. In other words, you don't know that they have or have not got rotten principles? A. No.

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[63] By Mr. Kapral: (Continuing)

Q. Do you think, Mr. Hutchins, that any one of these gentlemen seated here, the plaintiffs in this case, or all of them, are traitors to their country? A. The material written was written because of the feeling that we as Union officials had toward these individuals who we knew were prospering by the sweat of our brow. They are gaining without really contributing anything. It was just a matter of a figure of speech, to say like the cow jumped over the moon, which I know is not physically possible. So it was just a figure of speech as [64]such.

Q. Was it a figure of speech of any one of these gentlemen, or all three of them, that they were traitors to their families or wives? A. We used the whole statement as a figure of speech, something to express our emotions with. It was just a metaphor or something that you would use like the rat ate all the cheese out of the warehouse, or something of this nature.

Q. Then you are saying, or what you are really saying is you can't say one way or the other whether these gentlemen are guilty of being traitors or have rotten principles or anything that was written in the article, one way or

the other? A. No, I can't say as a matter of fact that they—we just used these statements as a figure of speech.

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[71] REDIRECT EXAMINATION

BY MR. KAPRAL:

Q. Mr. Hutchins, was this article written and composed and printed in this publication to coerce these gentlemen here to join your Union? A. No, sir, I wouldn't say that, used to coerce them. The purpose of it was to publish the names of individuals who did not belong to our Local.

Q. For what purpose? A. To try and persuade them to join the Local.

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[76] ANGELO PARKER, called at the instance of counsel for the plaintiffs as an adverse witness, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAPRAL:

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Q. Now directing your attention to the time of the alleged libelous publication, June, 1970, did you hold any position at this time with the local Union? [77] A. Secretary of the Association and editor of the paper.

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[78] Q. Did you authorize this article to be printed? A. I did.

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Q. To the best of your knowledge has any apology ever been made to any one of these gentlemen for the article printed bearing their names? A. Not to my knowledge.

Q. Have you as secretary of the Union apologized to them personally?

[79] MR. RATNER: I will stipulate with counsel we have not apologized, and authorized no apology, and we offer none now.

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Q. How many persons are there in Local Branch #496, how many members do you have? A. Roughly around 400 or 420, something like that, active members.

Q. The publication Carrier's Corner, does each member receive the publication? A. Yes.

Q. Does anyone else receive this publication? A. No.

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[80]Q. Let me ask you this. Are there papers of affiliation concerning your local Old Dominion Branch No. 496 with the National Association of Letter Carriers? [81]A. We have a charter.

Q. Pardon me? A. A charter. We are a chartered branch.

Q. Of the National Association of Letter Carriers? A. Yes.

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[83]Q. Now let me ask you this, Mr. Parker, where did you obtain this article? You say you submitted it to the printer, where did you obtain this article published in the June, 1970 issue of Carrier's Corner concerning these three gentlemen where their name was involved? A. From the Richmond Trades Industrial Council.

Q. Is that a member of the AFL-CIO? A. Yes.

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[84]Q. When you submitted this article for publication did you know for a fact that all three of these men were traitors of or to their country? A. Traitors to their country?

Q. Right. A. In what respect?

Q. The article says they are guilty of treason to their country. Did you know for a fact they were guilty of treason to their country? A. Not for a fact. The article isn't based on fact. The article is made up of figures of speech.

Q. Do you know they had rotten principles? A. Pardon me?

Q. Do you know they had rotten principles? A. Well, in my opinion, if a man is going to take benefits that other people have to offer him and not want to have any input in it, I think these principles are to be questioned.

[85]Q. In other words you are saying, if I am correct, that if a person stands by, such as these three gentlemen, and doesn't join the Union that he has rotten principles? A. If he is getting the, or all the benefits on his job and he doesn't want to affiliate with the people who have fought for them then I think he has rotten principles.

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Q. So you went ahead and authorized this article to be printed, right? A. I did.

Q. Did you give any thought or any concern as to what people who read this article or came in contact with this, what they might think of any one of these three gentlemen after they read this?

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Q. Did you give it any thought after this article was disseminated around or among the four or five hundred persons these gentlemen work with every day, what bearing this would have on their reputation? A. Well if these gentlemen are in a sense being a leech on these people they are associating with [86]every day I think it should be brought to light to the individuals they are associating with, what is going on.

Q. What you are saying, you really didn't care what they thought? A. If you want to put it that way.

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CROSS EXAMINATION

BY MR. RATNER:

Q. Mr. Parker, I hand you a card which is printed both on the front and back and ask if you can identify that card.

MR. CHERRY: May we see the card?

MR. RATNER: You can see a copy.

NOTE: Mr. Ratner hands counsel a copy of the card.

Q. Can you identify that card? A. Yes, sir, that is the article that was published in our local paper.

Q. Is this the card you were referring to which you got from the Richmond Labor Council? [87]A. Yes, sir.

MR. RATNER: I offer it.

THE COURT: Defendants' Exhibit No. 5.

NOTE: The above referred to card is marked and filed by the Court as *Defendants' Exhibit No. 5.*

Q. Now I direct your attention to the first two lines on the side which contains the printed matter and ask you whether that contains a title and an author? A. It says A Scab by Jack London.

Q. Then does it identify who Jack London is? A. A well known author of Call of the Wild, Sea Wolf, et cetera.

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[93]HENRY M. AUSTIN, a plaintiff herein, called in his own behalf, first being duly sworn, testified as follows:

DIRECT EXAMINATION

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Q. Now prior to the publication of this article in question, and of the various other articles [94] referring to you as a scab, had your associates in the Post Office Department, fellow carriers, had any of them shown any animosity toward you? A. I always had a very very admirable association with every employee in the Richmond Post Office until this article started appearing.

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[95]Q. Is it your own election that you don't join the Union? A. It is.

Q. Now will you tell us what occurred with reference to that publication involving you. A. Yes. The first time I was at my case working and there was a lot of laughter going on behind me and people running up and down the aisle with the publication. Not knowing what it is I didn't pay much attention to it.

THE COURT: Mr. Austin, will you talk a little slower and a little more distinctly. A. The first I realized the article was being printed with my name in it, several carriers was laughing and carrying on with that behavior behind me. I had no idea what was going on. Fifteen or twenty minutes later another carrier I know came and asked me did I realize I had made the headlines and showed me my name at the head of the list in Carrier's Corner as a scab. I ignored it the first time and thought it was a one time situation and I would just forget it.

It was about four or five weeks later this same pattern showed itself, a lot of laughter, running [96] up and down the aisles, et cetera, and again I realized my name had appeared in there as a scab. I immediately went to the Postmaster. I informed him what was going on, that coercion was being used, and the Postmaster informed me then to give him a letter to present to the Labor Relations Board. I informed the Postmaster I had no desire to make trouble for anyone but I thought Management should be advised that coercion was being used on members of the Richmond Post Office, guaranteed by the Federal Government that he doesn't have to join the Union Carriers, and coercion was being used to join the Union. Mr. Netherland, you will recall the witness, made a copy and said he would talk to the President of the local Union about it.

I guess maybe two weeks after I had seen the Postmaster the President of the local Union—who is also a mail carrier on the route where I live—when the President of the Union came by my house he stopped and we had about a fifteen

minute conversation in the yard. I informed the President of the Union although my name was appearing as a scab it didn't bother me too much because I didn't know what a scab was, but it could cause somebody to lose his job.

Just the week before a shop steward, member of the Union, came to the case where I work. Several of them were around and he called me a scab. I [97] informed the shop steward, Mr. Horsley, if you mean I am not a member of the Union, I will ask you a question. He said that is not what he meant. He said I am calling you a scab. At this time I went to the telephone again and called the Postmaster. The Postmaster was out of town. With my temper I do have, something else could have happened and both the shop steward and myself could have lost our job. For this reason I think it is bad policy for printing people's names as a scab.

Mr. Hutchins told me that is one of the tools they used and had been using on carriers who had a chance to join the Union and had not done so, and there was nothing the Postmaster could do about it. It was only a week later that this article describing what a scab actually was appeared in print. There was a lot of commotion around the office for about two weeks. No one would show it to me. Some carriers came to me and told me although they were members of the Union they had nothing to do with it, and I said nothing to do with what, and the Assistant Supervisor said you mean you haven't seen it and I said no, I haven't.

I left my case and returned to the case about five or ten minutes later and in my wastebasket beside my case was one of these publications. I picked it up and read what was in the article. I immediately then went back [98] to the Postmaster again. The Postmaster advised me I would have to take whatever action I deemed necessary. I advised him I was going to get counsel and sue. I informed Mr. Hutchins the day I talked to him in my yard that I would sue the next official of the Union who called me a scab, that I was going to sue the whole Union. The President informed me that

day I couldn't sue the Union for what some official says. I informed the President as long as he was an official representative of the Union and called me a scab I was going to take him to Court to prove what a scab was. That leads up to the time I contacted counsel.

Q. Did the President ever tell you whether they would stop this publication against you? A. No.

Q. Did he tell you how you could stop it? A. By joining the Union.

Q. Did he tell you that was the only way you could stop it? A. He told me it was nothing—I had been given an opportunity to join the Union and nothing me or the Postmaster could do to stop the printing.

Q. Except join the Union? A. That impression was left. I don't know whether the words were used.

Q. And you state you had complained to the [99] President of the Union prior to this publication of the article which they refer to as being written by Jack London? A. A couple of weeks, or a week or two weeks before this.

Q. And told him at that time you didn't know what a scab was? A. Right.

Q. Then they published this definition? A. Right.

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[101] HENRY M. AUSTIN, resuming the witness stand, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. CHERRY: (Continuing)

Q. Mr. Austin, will you tell us how this article defining a scab, which was published in June in Carrier's Corner, came to your attention and the general reaction you had from it. A. As I stated before, several of the carriers came and mentioned to me that though they were members of the Union they had nothing to do with this particular article that appeared in this publication. At that time I had

not seen the article, but after I left my desk and went to the mail case a copy of the publication was in the wastebasket beside my desk. After reading the article, as I said, I went back to the Postmaster and then to seek the advice of an attorney.

Now this thing has affected me in several different ways, which showed me plainly they were out to maliciously hurt me, my job, et cetera. Many of the [102] carriers at the station after the article came out—we always had a good relationship, in fact, we socialized pretty much together in the afternoons and on weekends—after this article appeared most of them that I had been associating with for several years stopped speaking. At one station which I worked there was nobody in the whole office. Thus really for the last several months I have been working in what, at best, can be described as a hostile atmosphere, and which after 14 years had not presented itself, so it was the article itself which evoked the hostility.

In my social capacity outside of the Post Office as a member of the Grand Lodge Committee and a member of the Committee of Concern of the City of Richmond, and the Hundred Year Centennial, either chairman or coordinator or member of the Advisory Board, most people locally know if I am speaking right. When I get out of my immediate environment I have had, or I have to convince people of different types of programs we want to put over. That is my job in this capacity.

Back in January or March, when introduced to a group of people sitting at a table in a social capacity, one of the ladies at the table said you are Henry Austin, the scab they are talking about. I later found out this lady was the wife of a Postal employee and [103] she had read the article and had discussed it with the auxiliary and so forth. This unnerved me at the time.

The next time I approached the rostrum I am chairman of Ladies Night program and someone said is that the

same one that appeared in that paper. Most of these are also Postal employees. This unnerved me.

And starting in January I got a migraine headache that began in January and didn't leave until the beginning of March. I had to go to the Emergency Room, a specialist at MCV, the clinic, and they diagnosed it as tension and nervousness and said there was nothing—I had to do about it myself. There is not much you can do to get over this sort of thing whenever you go to work and the same hostility exist.

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[123] ROY P. ZIEGENGEIST, a plaintiff herein, called in his own behalf, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAPRAL:

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[124] Q. Now state to the gentlemen of the jury how you first happened to find out about this article that had your name in it. A. Mr. Austin and I became acquainted when [125] I first was employed by the Richmond Post Office. We worked together for approximately two years. Mr. Austin called me on the telephone and told me about this publication.

Q. Now once he told you about this publication, what were your feelings and sentiments right after that? A. He read the publication over the telephone word for word and I just couldn't believe it. When I came to work for the Post Office my first dedication was to the service. I was raised to believe a man should give eight hours work for eight hours pay. So I felt my first obligation was to the Postal Service. When I heard about this publication I just couldn't believe that somebody would write something like this about me, whether they knew me or not. Then I got to wondering about all these people—I have spent the biggest part of my Postal career at one station, Bon Air. I helped

to start the first delivery in the Bon Air Station. And I have associated with several of the people for that same length of time, approximately nine or ten years at this station. Several are nonmembers, some are not. I had a very good relationship with all of them. The particular job I have I carry a particular route every week when the regular man is off and during Christmas time and during the year, especially during Christmas time, I was situated in such [126] a status that I could help other people. Most of the carriers carry their own routes and I kind of float, go to one carrier and help. I have Union, non-Union members, black and white, and never have any problems. I don't go around protesting about people that belong to the Union. I have no qualms about talking to the people. This is their privilege. Just as I felt it was my constitutional right to belong or not belong to the Union, which I don't like to belong.

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[130] Q. Now tell the gentlemen of the jury what effect this article had that was published concerning you, what effect it had on both you and your family. A. I just couldn't believe it. The next day when I went to work I looked at some of these people I had been working with and had a good relationship with and couldn't imagine who had written this article or why. My wife was distraught. She didn't want me to file this suit. We argued about it several times. She was worried and didn't know what would happen next. I felt some of the people that I work with became to some extent cool and distant to me. In one case my Union representative, Mr. Robins. He got in touch with his representative downtown and tried—after the letter had been produced in the Richmond newspaper and I had filed suit Mr. Robins called his Union representative and tried to in a way get back at me or harass me with trying to charge me with falsification of truck records and not letting the [131] supervisor know where I was.

MR. RATNER: That is irrelevant to anything in this case, after the witness had filed suit and the story was published in the public press.

MR. KAPRAL: Your Honor, I feel it is very relevant and goes to show the method at the time, after suit was filed, to harass this gentleman. He had been there 12 years and this hadn't happened before.

THE COURT: Objection sustained. Objection sustained. That brings up a collateral matter, whether such was true or the motive behind it. Objection is well taken. Sustained.

BY MR. KAPRAL: (Continuing)

Q. Continue. A. As I say, I am not perfect, nobody is. I just feel I have dedicated my time. I come in and work off the clock, which is something else the Union doesn't condone. As I say, I come in 30 minutes early in the morning and work off the clock sometimes, which is something the Union doesn't condone because it has been brought up several times between the Union and Management and Management made the decision they saw no reason for a man not to work if he wanted to work. I have done this mainly to help get my job done. In many instances if I had come in off the route early my supervisor would ask me to go out and help someone else if he was stuck or had a large amount of mail, which I have done.

Q. Mr. Ziegengeist, is your wife here today, sir? A. No, sir. My wife was very distraught and very nervous and couldn't bring herself——

MR. RATNER: I object, Your Honor. What relevance does that have?

THE COURT: Sustained.

Q. Mr. Ziegengeist, in the course of this matter, particularly after suit was filed in this matter and there was some publication in the newspaper, were you approached by a person you carried mail to about this matter?

MR. RATNER: I object, Your Honor. The suit is not predicated upon publication of an article in the newspaper after the suit was filed.

THE COURT: Objection overruled.

Q. Answer the question. A. When I filed suit and the article was published in the Richmond newspaper I was approached by——

[133] THE COURT: Just a moment. Does this bring, or are you bringing into evidence, Mr. Kapral, the result of what occurred after a newspaper publication which reported this suit had been filed?

MR KAPRAL: What was mentioned about what was written about Mr. Ziegengeist.

THE COURT: Go ahead. A. Several people on the routes I serve mentioned to me, because a lot of them know me, not on a social basis but because I had been out there a long period of time, asked me what I had done to make the Union write such a horrible thing about me. People in the neighborhood where I lived for eight years presented such a question. The man I buy gas from, on the way to Court this morning said, Oh, Mr. Scab, you're on your way to Court this morning and I said, that is right.

Q. Let me ask you this, Mr. Ziegengeist. Have you lost any money over this suit? A. No, sir, I haven't lost any actual money over it.

MR. KAPRAL: No further questions.

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[141] CYNTHIA ZIEGENGEIST, called at the instance of counsel for the plaintiffs, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAPRAL:

Q. State your name and address. A. Cynthia Ann Ziegengeist, 3333 Pinebrook Drive.

Q. What is your age? A. 16.

Q. Are you related to the plaintiff, Roy Ziegengeist?

[142] A. Yes, I am.

Q. Are you familiar with the publication in which your father's name appeared, Miss Ziegengeist? A. Yes, sir.

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[143] By Mr. Kapral: (Continuing)

Q. Miss Ziegengeist, will you state from your observation, firsthand observation, the effect this article had on your father. A. Well my mother and father have had many arguments since the case has come up and my mother and I have been very scared that someone might come around the house and possibly harm us.

Mr. Ratner: I object, Your Honor. This is one of the difficulties with allowing that type of question to be asked.

The Court: Objection overruled. That tends to indicate the effect on the plaintiff. Objection overruled.

Q. Continue. A. Well, as I said, we were very scared that someone would come around our house and harm us in some way and——

Q. Let me ask you this. From your [144] observance and from what you know yourself has your father ever mentioned this matter to you, say when he came home from work days? A. Yes, when he came home he would tell us that the men at work, his friends, would give him the brush-off at work and everything.

Mr. Ratner: I object.

The Court: Sustained.

Mr. Kapral: I have nothing further.

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[145] L. D. BROWN, a plaintiff herein, called in his own behalf, first being duly sworn, testified as follows:

Direct Examination

By Mr. Cherry:

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[146] Mr. Cherry: May I have Exhibit 2 there.

Q. (Holding paper) Were you aware of this publication wherein they stated that members who had resigned from the Union should be treated as lepers? A. Yes.

Q. Did they treat you as a leper when you got out?

Mr. Ratner: When what?

THE COURT: Do you have an objection?

MR. RATNER: The only objection is I can't seem to hear the end of counsel's question. No objection, but just my lack of ability to hear.

THE COURT: State your question again.

MR. CHERRY: Did they treat you as a leper when you got out?

MR. RATNER: Out of what? Your Honor, I don't understand the question and I do object to it.

MR. CHERRY: Out of the Union.

[147] THE COURT: What point of time, Mr. Cherry?

MR. CHERRY: When did you get out of the Union?

THE WITNESSS Approximately a year and a half ago. I don't know the exact date.

THE COURT: Next question.

BY MR. CHERRY: (Continuing)

Q. Did they treat you as a leper when you got out? A. They treated me cooly.

Q. They treated you cooly. Now was your name among these published as a scab prior to the publication of the article in question? A. On one occasion.

Q. Do you know about when that was? A. That was about in March.

Q. About March. What did you do when your name was published and listed as a scab? A. I tried to ignore it. I said probably if I didn't say anything and let it go it would go away.

Q. Now when did the next publication come out? A. The next publication came out in June.

[148] Q. Is that the one we are speaking of here which carries the definition of a scab? A. Right.

Q. When did this come to your attention? A. It came to my attention one day when I was working and happened to go into our Swing Room, where we eat lunch, and it was printed on the bulletin board.

Q. It was posted on the board? A. Posted on the board and I saw it and read it and didn't like it, but some of the

fellows were afraid I didn't see it and they called my attention to it. I had several call my attention to it.

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[149] Q. How has this article affected or how have [150] you been affected by this article? A. In several ways. I have been upset ever since the article was published. I have headaches, have been nervous, and I am under the doctor's care for heart palpitation and this hasn't helped it at all. It also affects me or my family by being or working under a hostile atmosphere, when I come home it is not too easy to go along with the family after work.

Q. You refer to working under a hostile atmosphere. Did that develop after this article was published? A. Yes, it did.

Q. Can you tell us a little bit about what you mean by a hostile atmosphere? A. The fellows joke you and call me all kinds of names. Beside scab they have other names they refer to me as. They get a joke out of calling me all different types of names. Anything they can get at me with they apply to me.

MR. CHERRY: That is all.

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[160] JURY OUT

THE COURT: Mr. Ratner.

MR. RATNER: May it please the Court, the defendants move the Court to strike the evidence with respect to the plaintiffs on all the grounds stated in their affirmative answers, and on the grounds of the First Amendment and the Fourteenth Amendment, and on the grounds of the Executive Order previously cited, the memorandum in support of our affirmative answers, and in our prior briefs and in the comments of the memorandum in support of the instructions which have heretofore been submitted to Your Honor.

[161] We think the evidence produced by the plaintiffs to this point in the case has itself established the validity

of our contention that the publications were constitutionally and statutorily privileged and that they were not allegations of fact but expressions of opinion, and as such beyond the reach of judicial process.

THE COURT: Motion overruled. Now are you ready to start your evidence?

MR. RATNER: Yes, Your Honor. With respect to our proposed stipulation, with respect to the definition, that is in the request for admission——

MR. STEINGOLD: It is stipulated as to truth but not as to relevancy?

THE COURT: Was it filed in all three of the cases or just in one?

MR. STEINGOLD: I think in all three.

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[163] MR. RATNER: Thank you, Your Honor. Gentlemen of the jury, the Court has permitted me to read to you the following dictionary definitions of the word scab. One, the definition of the word scab which appears in Webster's New Twentieth Century Dictionary Unabridged, Second Edition, published by World Publishing Company in 1958, Page 1614, is and I quote "scab, n., 5.* * * *"in the labor movement, (a) A worker who refuses to join a Union, or who works for less pay or under different conditions than those accepted by the Union. (b) A worker who refuses to strike or who takes the place of a striking worker." That is the end of the quotation from Webster's New Twentieth Century Dictionary.

Two, the definition of the word scab which appears in Webster's Seventh Collegiate Dictionary, published in 1966 by G. & C. Merriam [164] Company, and which is contained in the Seventh Edition at Page 766, relating to the word scab, to its use in the labor movement, is "3.(b) One who refuses to join a Labor Union."

Three, the definition of the word scab which appears in Funk & Wagnalls New Standard Dictionary of the English Language as to the labor movement is "scab, 5. A workman

who does not belong to or will not join or act with a Labor Union; one who takes the place of a striker."

Four, the definition of the word scab which appears in Century Dictionary Encyclopedia, 1897, Volume 8, Page 5365, relating to the labor movement as "scab, 4. Specifically in recent use, a workman who is not or refuses to become a member of a Labor Union, who refuses to join in a strike, or who takes the place of a striker. An opprobious term used by the workmen or others who dislike his action."

Five, the definition of the word scab which appears in Murray's New English Dictionary, in 1914, Volume 18, Page 156, relating to the labor movement. "scab, 4. (b) A workman who refuses to join an organized movement on behalf of his trade."

[165] Six, definition of the word scab which appears in the Oxford Dictionary, Volume 9, Page 155, 1933 and 1961, James A. H. Murray, Editor, relating to the labor movement, is "scab, 4. (b) A workman who refuses to join an organized movement on behalf of his trade."

We will now call Kenneth Fiester as the first witness for the defense.

KENNETH FIESTER, called at the instance of counsel for the defendants, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RATNER:

Q. Mr. Fiester, what is your name and address. A. Kenneth Fiester. I live at 12406 Skylark Lane, Bowie, Maryland.

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[167] Q. What is this organization you refer to that you are President of? A. Well, that, nearly all the national or international unions and many of the geographical labor bodies, State and City bodies, and quite a large number of local unions, publish magazines, newsletters and so on. A large number of those that are produced by AFL-CIO

organizations have formed again a voluntary organization called International Labor Press Association, and about 400 of those publications are in our association. We do restrict ourselves to AFL-CIO associations because we are a fraternal arm of AFL-CIO. And the association functions, I might say, like a trade association in another field. [168] That is, it is not a news service, but just by coincidence, one of our current endeavors is attempting to get what we think is a more equitable deal on postal rates than the new Postal Service proposes to give us.

Q. Have you had experience in your lifetime which has caused you to become familiar with or to read or to examine a wide variety of union periodical publications. A. Well, in one way or another I would say I have been connected with union publications for 30 years, even before I was employed by unions, and, of course, now in my present office I see all of our member publications. They must send us each issue and I look at all of them.

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[169] Q. Mr. Fiester, I hand you what has been received in evidence in this proceeding as Defendants' Exhibit No. 5 and show you the front of this card which has a legend on it headed in larger type than the other, A Scab. A. (Looking at card)

Q. And I ask you whether you are familiar with the material which appears thereon? A. Yes, I am.

Q. How did you become familiar with that material?

A. Well, I suppose the first time I saw this must have been 30 years ago or so. I can't pinpoint the occasion. The last time I saw it before this I think was about ten days ago when our office received a leaflet published by the Rubber Workers Union, which had various articles in it. It was not a periodical, a pamphlet, and this was included in it. It has been around in the labor movement for at least 30 years. Since Jack London died in 1916, it might be longer than that, but I can't testify to it.

Q. Can you give us an estimate of the number of times you have seen that legend published in union publications in one sort or another over your lifetime? [170] A. No.

Q. Why can't you give us that? A. Because it has been published so often. I wouldn't attempt to make a count. It is something that—let me put it this way, most of the time I have been editor of a union publication of one kind or another. All of us, I think, who have engaged in this work are familiar with this quotation. It is something of a classic in the labor movement and when circumstances seem appropriate or when we say to ourselves, perhaps as editors do, well we haven't done anything like this in a long time, we put it in the paper so it keeps popping up all the time. It has been used on handbills and so on. I know the textile workers for whom I worked many years used it frequently.

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[171] CROSS EXAMINATION

[172] BY MR. KAPRAL:

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[173] Q. You stated during the last 30 years and the time you have been involved in the labor movement you have many many numbers of times seen this article appear?

A. Oh, yes.

Q. Have you seen this article appear in connection with any of these three gentlemen before? A. No, I don't know these gentlemen.

Q. Have you ever seen this article appear listing certain persons names? A. Not as individuals, no.

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[182] JOSEPH JOHNSON, called at the instance of counsel for the defendants, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RATNER:

Q. State your name and address. A. Joseph Johnson, 4733 Southland Avenue, Alexandria, Virginia.

Q. Mr. Johnson, what is your position? A. I am National Field Director for the National Association of Letter Carriers and on the Executive Board of the National Association of Letter Carriers.

Q. What is your territory? A. My territory encompasses Virginia, West Virginia, Maryland and Washington, D.C.

Q. Where is your office located? A. 100 Indiana Avenue, N.W., Washington, D.C.

[183] Q. In your capacity as National Field Director of the National Association of Letter Carriers did you have anything whatsoever to do with writing, editing, printing, mailing, supervising or directing the publication known as Carrier's Corner? A. No.

Q. The upper left-hand corner of the bottom of the page, one corner of Carrier's Corner, carries what has been referred to as a seal of the National Association of Letter Carriers. Is that a seal of the National Association of Letter Carriers? A. No, that is the emblem of the National Association of Letter Carriers. All trade unions have a particular emblem and this is the carriers at the national and local level whenever you put out anything.

Q. The purpose is to demonstrate affiliation? A. Right.

Q. Would you look at the line that immediately appears under the Old Dominion Branch on that front page. A. (Looking) National Association of Letter Carriers?

Q. Yes. A. AFL-CIO.

Q. That also is designed to demonstrate [184] the affiliation? A. Right, absolutely.

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[190] Q. Did you see any of the issues of Carrier's Corner which have been introduced in evidence here, particularly this one that has been marked Plaintiffs' Exhibit No. 2, before it arrived at your home in the normal course? A. No.

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[196] Q. You have heard in this courtroom, sitting here this morning, my description and why Union men and the Unions regard nonmembers as an anathema. Would you tell us please, in your own words, what you consider a scab to be and what your attitude is toward a scab. A. Well I know for a fact, or always considered a scab a non-union member, and I personally have no use for a scab because I feel he takes money and bread out of my mouth. I feel strongly when I pay my dues in order to gain these benefits and somebody is going to walk in my face and say I am going to get it whether I pay or not. Honestly, the Jack London article, the first time I saw it was in the paper, but I think it expresses sometimes the way a person feels, figuratively speaking. I feel strongly when I know, and I know the benefits involved that were gotten through the efforts of the Union. No man in this Post Office, Union or not, can go to the Postmaster and ask for a pay raise and get it. The Postmaster does not have the authority to give it to him. No man can go to the Postmaster and ask for a route and get it. The Postmaster does not have the authority to give it. These are worked out by the Union and it cost money to run the Union, and that is the way I feel about a Union.

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[199] CROSS EXAMINATION

BY MR. KAPRAL:

Q. Mr. Johnson, as far as Carrier's Corner is concerned, the seal in the left-hand corner states National Association of Letter Carriers. I believe you referred to that as an emblem other than a seal? A. That is what it is, an emblem.

Q. Aren't seals and emblems the same thing? A. No, a seal is a little round thing that has an impression on it. But this is on stationery in the corner just like a letterhead. It is the emblem of the National Association of Letter Carriers. We have it on uniforms and different things. We

just put the emblem on.

Q. It is true, is it not, an employee has a legal right not to affiliate with you if he chooses not to. Isn't that right? A. Right.

Q. This publication which is in question here, and this was actually a tool wasn't it, used by Local Branch No. 496 to urge or persuade these nonmembers to join the Union?

[200] A. That is what they said, but I have no part in it.

Q. I asked whether this was a tool to urge or persuade these people to join the Union? A. That is what they say. So if that is the way they felt, it was a tool.

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[204] LAWRENCE HUTCHINS, called at the instance of counsel for the defendants, having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. RATNER:

Q. Mr. Hutchins, you have previously testified in this case, have you not? A. Yes, sir.

Q. One of the plaintiffs testified to a conversation that he had with you on your route concerning his nonmembership in the Union. Do you recall who that was? A. Yes, Mr. Henry Austin. I serve his home address at 2310 Marvin Drive.

Q. Will you tell us what you recall about that incident? A. Well as I approached his home to make his delivery he was sitting on the porch and said something, best I can recall, I see you are publishing my name in the local newsletter because I am not a Union member, and I said yes. And he said I may agree with the Union in its principle but I have the right not to affiliate with it, and I said yes, that is your right. We also have the right [205] to get all of the people in our craft to associate with our organization. He said if you continue to do it somebody is going to get hurt and I will see some action is taken

against somebody if you continue to publish my name in that paper. That is as best I recall.

Q. What did you say? A. I told him that was his right to exercise any privilege or opportunity he had to gain relief.

Q. Did you state to him that this was one of your tools you used? A. I can't recall specifically making that remark to him.

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[208] CROSS EXAMINATION

BY MR. CHERRY:

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[210] Q. Can you explain to us why you published Austin's name three times? A. We published his name three times because we were publishing all known non-union members names. As more names appeared and came to us, we published the ones we had first, and as we got more names we continued to add it to the list.

Q. Why were you publishing the list? A. To publicize to fellow members of the Letter Carriers Association that these members did not belong to the Union.

Q. Why did you want to publicize that? A. So it would be general knowledge that these are the individuals.

Q. Why did you want it general knowledge? A. So the people who associate with them [211] would know it.

Q. Why did you want these people to know it? A. For their own information.

Q. So they would stop associating with them? A. Yes, sir, if that is what they wanted to do because they were non-union members. Here we were dealing with individuals who even the right to have insurance, which most people in private industry have, this right to have insurance that one of the plaintiffs has testified to he paid an additional cost for, even this right to have insurance was gained for him by Union efforts. Even rights the public doesn't know about, as far as good Postal service is concerned, is the

concern of good Union members. Consequently we thought here was an individual riding on somebody's coattail and earning his keep by the sweat of somebody else's brow.

Q. All right. Then it follows that you wanted it publicized so as to persuade these people to join the Union? A. Yes, sir.

Q. And by joining the Union they were joining the National Union, were they not? A. No, sir, Local Branch No. 496.

[212] Q. And the National level, too? A. Only predicated upon meeting certain requirements, which the National has a right to decide whether they can become National members.

Q. If you didn't become a member of the National Union in due course would you remain in the branch? A. No.

Q. So becoming a member of the branch was predicated on becoming a member of the National Union? A. Yes, sir.

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[215] IN CHAMBERS

THE COURT: I thought what I would do, gentlemen, is discuss generally the posture of instructions. I have read over the ones that each [216] of you have submitted and have some changes in my mind, and then maybe after you leave I will work on them a while and if convenient, have you meet me at 9:00 o'clock in the morning and then, hopefully, we can get it to the jury.

I guess you have a Motion you want to put on the record at the conclusion of all the evidence, Mr. Ratner?

MR. RATNER: We would like to renew the Motion to strike plaintiffs' evidence. We would move the Court to dismiss on the grounds of the first two amendments or first two—or all four grounds of the affirmative answers, and we would renew our Motion based on the Executive Order and the First Amendment and Fourteenth, as a matter of law.

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]217[THE COURT: The Motion is overruled.

MR. STEINGOLD: If Your Honor please, I join Mr. Ratner's Motion on behalf of the Local, so the record will be clear.

THE COURT: That is also overruled.

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IN CHAMBERS

[226] OBJECTIONS AND EXCEPTIONS TO GRANTING OR REFUSING INSTRUCTIONS

THE COURT: The main instruction, of course, on the question of liability, is being typed and you have not seen that so I will tell you, and it would be obvious from the instructions the way the Court has ruled on various points. First of all, Mr. Ratner, I feel under our, under the law in Virginia relating to liability, that the burden of proof has to be by a preponderance of the evidence rather than clear and convincing evidence.

Second, I feel that reasonable men could not differ as to the responsibility of the national union for the action of the local, in the main based upon the United Brotherhood case and the Laburnum case, which I am sure you are familiar with.

[227] Our Court of Appeals in the Laburnum case, which was affirmed by the United States Supreme Court, our Court of Appeals held that by the very nature of the organization and the interest of the national union in that case, the evidence was sufficient to show that an agency relationship existed between the two bodies.

The facts of the Laburnum case as to that involved the United Construction Workers, affiliated with the United Mine Workers. There was an affiliation as part of its charter fees, initiation fees, and dues were paid to the United Mine Workers of America. According to the defendants' brief, "Its members are a part of UMWA, but retain their identity, membership rights and privileges at all times as members of District 50." District 50, the Court said, is an arm or branch of the United Mine Workers of America.

That is not a complete recitation of facts in that case but unless the plaintiffs feel otherwise, that is that the question should be submitted to the jury, I feel the Court should decide that as a matter of law, and if a verdict is [228] for any one or more of the plaintiffs it should be against both defendants based on that.

MR. RATNER: I object and except to that.

THE COURT: Maybe you would want to object when you see the instruction. I am just preliminarily pointing it out so it might help you to understand. Number one, preponderance of the evidence and not clear and convincing evidence. Number two, the liability is on both defendants, if there is liability at all. So the final instruction that is being typed up now will deal with the merits or liability feature of the case, which probably won't make either side happy but that might mean it is not completely in error.

After you have seen all of the instructions, if you will hand me such of your original instructions as you want me to mark refused so you can save any points or objections you have, I will help you there.

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[232] THE COURT: Let the record show the instructions tendered by the defendants, A through P respectively, are refused and the Court will grant instructions one through seven.

MR. RATNER: We have no objection as to *Instruction No. 1,* aside from our objection as [233] previously stated in not taking the case from the jury and directing a verdict for the defendants.

We have no objection to *Instruction No. 2.*

We object to any instruction based on a preponderance of the evidence and its meaning, which is *Instruction No. 3,* believing that the law, applicable law as defined by the Supreme Court of the United States, requires clear and convincing evidence and that the burden of proof be on the plaintiffs of every element necessary to recover.

We object entirely to *Instruction No. 4,* with the single exception of the paragraph third from the bottom, which in our view is not entirely erroneous. We object particularly to the definition and use of the term "actual malice" as equated with sinister or corrupt motives such as hatred, personal spite, ill will, or desire to injure the plaintiffs, on two grounds. First, there is not evidence of record there was any such motives. Secondly, on the grounds that is not the constitutionally accepted definition of the term "actual malice" as defined by the Supreme Court, [234] which relates exclusively to factual falsity or lack of concern for factual truth or falsity.

THE COURT: Let me state on that point, Mr. Ratner so you will know the reason the Court put it in those terms. Our statute on insulting words speaks of words spoken. Professor Prosser and other texts, of course, specifically in that example on Page 759 in Prosser on Torts, 3rd Edition, the Court there talks of distinction between assertions of fact and those of opinion, and goes on to say that there is occasion in which matters of opinion, as contrasted to statements of alleged fact, may certainly be defamatory. I think that is the state of the law in Virginia under the statute on insulting words.

The cases cited by the defendants, of course, all deal in the main with newspaper reports of events rather than in the context here. Really this is not a report of any event in the sense that it was a report in the press. This is really the written statement or opinion—as the case may be—in that it is a purported definition of a scab. And so for those reasons in the main, I feel under our Virginia law that it [235] is not necessary that matters of fact be misrepresented or that the plaintiffs be restricted merely to showing that there have been assertions of fact which are not true.

MR. RATNER: Thank you. Merely to keep the record perfectly straight, we are not relying upon Virginia law but rather upon the Constitution of the United States as construed by the Supreme Court of the United States. We

think the fact that the publication is not in a newspaper of general circulation but in a union leaflet mailed to the homes of its members, making it, if anything, more than less privileged constitutionally, and that the fact that what is used in hyperbole and figures of speech rather than fact or opinion, make it absolutely immune. But we are relying not upon the Virginia law for this. I make it clear. Our reliance is upon Constitutional law and predominant doctrine.

THE COURT: As to Instruction 1 through 7.

MR. RATNER: And, indeed, Your Honor, I should add we have attacked the Virginia statute, both on its face and as applied, on overbreadth and [236] vagueness grounds and we renew that objection in light of these instructions.

I object to *Instruction No. 5* both on the grounds of the preponderance of the evidence standard and for its failure to specify that there is no possibility of recovering for a mere show of injured feelings resulting from words spoken concerning the plaintiffs on a privileged occasion, by persons privileged to communicate and to hear, and, that they are not entitled to recover for loss of favorable social relationships on the part of persons who are offended by the conduct referred to in the written publication.

We object entirely to *Instruction No. 6* for the reasons stated in our comparable instruction.

MR. STEINGOLD: I want to add to that that the instruction tells the jury that there is no limit whatsoever to the amount of their verdict.

THE COURT: Of course, it is limited by the amount sued for.

MR. STEINGOLD: It doesn't tell them that.

[237] MR. RATNERS Nor, I believe, is the jury told at any point in these instructions that the only damages they can award are those directly attributable to the publication of the specific article sued on, mainly the one with the London definition in it, and it does prevent recovery of damages for any losses attributable to prior publications, such

as January through March, 1970, which are not the subject matter of complaint at all, and yet the subject matter of the testimony.

THE COURT: I wondered about that when the evidence came in. There wasn't any objection on that evidence on these prior occasions. But shouldn't the jury be told they can only award damages, if any, as a result of any injury resulting from the publication sued on. There has been evidence of prior publication, and perhaps even if objection had been made, it was admissible to show motive or intent. But shouldn't the jury be told they cannot award damages except those which flow directly from the publication in June, 1970?

MR. CHERRY: Correct.

MR. KAPRAL: I think that is correct.

[238] THE COURT: Perhaps in Instruction No. 4, in the second paragraph, that could be handled by, circulated defamatory statements, and add in June of 1970, with actual malice—. And then at the end of that paragraph, you may not award damages for statements made at other times or other occasions.

MR. RATNER: Yes.

MR. KAPRAL: That takes care of it.

MR. RATNER: I did want to say, Your Honor, with respect to—I don't see the instruction relating to the liability of the National Association.

THE COURT: It is in Instruction No. 4. The jury is told that if the plaintiff proves by a preponderance—under these circumstances, the burden is upon each plaintiff to prove by a preponderance of the evidence.

MR. RATNER: I wish to make a specific exception to that portion of *Instruction No. 4*, second paragraph, which has just been referred to. A, to the finding as a matter of law by the Court that Branch No. 496 was acting as the agent of the defendant National Association. If there is any [239] evidence in this record that permits any conclusion that indeed the National Association was a respondent

civily under the principles of respondeat superior, such a conclusion of liability could only be drawn by the jury. However, we further object on the grounds that as a matter of Federal law, Federal predominant law, and Federal freedom of speech law, under the circumstances of this case there can be no attribution of liability, 209 in ALC, for the acts of Branch No. 496 in connection with the publication of Carrier's Corner, under the circumstances shown by this record.

In connection with *Instruction No. 4* we specifically except and object to the failure of the Court to define in its first paragraph what is meant by the term privileged and what constitutes abuse of such privilege.

Instruction No. 5, the defendants except to the instruction that a jury is entitled to award damages to compensate the plaintiffs for any insult to them, and except to the failure of the Court to instruct the jury that in order to an insult to be compensable at all that actual [240] monetary loss resulting therefrom must be proven and that mere "pain and mental suffering and mortification" resulting from an insult is, as a matter of Federal Constitutional law, not compensatory and may not form the basis of an award if it is for compensatory or punitive damages.

Instruction No. 6, we except to the incorporation, by reference, of the definition of actual malice previously given and for the reasons previously stated. We object to the failure of the Court to instruct the jury that in order for compensatory and punitive damages which may be awarded to avoid excess, and that objection is predicated upon decisions of the Supreme Court of the United States defining limitations of the State Court libel law in damage actions, particularly where labor disputes are involved. The second paragraph of *Instruction No. 6,* the defendants object to the failure of the Court to determine what the jury should consider and in what light it should consider the relationship of the particular plaintiff and the defendants to each other, particularly in the absence of any definition [241] of the

scope of privilege. In short, we object to these instructions as totally open ended and incompatible with the guidelines laid down by the Supreme Court of the United States for the trial of these actions.

We object to *Instruction No. 7* on the ground that it erroneously incorporates the liability of the NALC upon a finding of liability of Branch No. 496. I am speaking now of paragraph one and two.

MR. STEINGOLD: If Your Honor please, I would like to add, and for Your Honor to hear this objection to *Instruction No. 4*. In addition to Mr. Ratner, the first paragraph of Instruction No. 4 refers to a privilege but doesn't define privilege, which leaves both counsel and the jury without any yardstick with which to argue even.

THE COURT: The evidence you have shown by your evidence, that under the circumstances here that the union had a right to encourage membership and had a right to make—as pointed out later—had a right to make statements, words of abuse, indicating dislike, low opinion and so forth, and that vulgar name calling, hostility [242] or ill will is allowed. For that reason it was left without any further elaboration of privilege. Certainly you may argue that a union, as I am sure you will under the evidence, that the union had a right under these circumstances to do more than if the privilege has not existed. Go ahead and make your objection. That is the reason I didn't elaborate further on that.

MR. STEINGOLD: The third paragraph of *Instruction No. 4* is a finding instruction embodied into this definition instruction. It tells the jury unequivocally that the statements complained of are to be considered defamatory and libelous.

THE COURT: If—

MR. STEINGOLD: If they prove they were made, and we don't deny they were made.

THE COURT: If they prove such statements were in words which from their usual construction and common

acceptation were considered as insults, I am leaving that to the jury to decide.

MR. STEINGOLD: It starts out there as privilege, without defining privilege, and disregards [243] privilege and tells them it is the same as two individuals fighting in the street and cursing each other.

THE COURT: First of all, if the jury finds the words are not defamatory then that is the end of the case.

MR. STEINGOLD: Assuming they find they are defamatory in the ordinary sense of two individuals who hate each other, this is a trade union case, and as Your Honor has stated in paragraph one, that is a certain privilege. But then the Court abandons privilege and tells the jury this is just plain ordinary malice.

THE COURT: I didn't mean to do that, Mr. Steingold, I think if you will look at the second paragraph closely, that is the premise on which the instruction is based. Under these circumstances, the burden is upon each plaintiff to prove by a preponderance of the evidence, number one, that the defendant circulated defamatory statements. Within that, the jury has to know what a defamatory statement is under the law. And, two, that the statements were actually malicious. And, third, that such defamatory statements, [244] if any, caused damages. Those are the three. That is the thought I intended to convey. Number one, the plaintiff has to prove because of the privilege, that these were defamatory statements, were circulated with actual malice, and that the plaintiff suffered injury. Then the third, fourth, fifth and sixth paragraphs attempt to define those terms, and then they conclude with if you find the plaintiff has proven that you will find against the defendants. If you find the plaintiff has failed to prove that by a preponderance of the evidence you will find in favor of the defendants. That is the way I intended the instruction, the meaning I intended to convey. But you certainly save your point.

MRS STEINGOLD: We object and except to it.

MR. RATNER: I also would except for the failure to include, in that very same paragraph Mr. Steingold had reference to, the fact that the words in their usual ordinary construction and common acceptation—in that context, the setting they were used, namely a labor dispute context, which would make the dictionary definition of the [245] term as used in a labor dispute context, the usual and ordinary acceptation, or understanding, of the definition of the term.

THE COURT: You don't have objections to that do you, Mr. Cherry? What was that phraseology——

MR. RATNER: Inasmuch as these words were used in a labor dispute context.

THE COURT: Add that at the bottom of the page, they are to be construed according to their usual construction and common acceptation——

MR. RATNER: Under the circumstances of this case, That would be the dictionary term as used in a labor dispute.

THE COURT: You had some better language.

MR. RATNER: Inasmuch as the words were used, under the circumstances of this case, in the context of a labor dispute.

THE COURT: Under the circumstances of this case, that is, in a labor dispute.

MR. RATNER: Right.

THE COURT: So I will add—

[246] MR. RATNER: That would be the dictionary definition of the term as used in labor disputes.

THE COURT: I would not highlight that evidence. You can argue that. The jury may say well, the definition in the dictionary of a scab is fine but this was more than a dictionary definition that was printed, so for me to point up the dictionary definition alone would not be proper. I will add at the end of paragraph four—that is, they are to be construed according to their usual construction and common acceptation under the circumstances of this case, that is, in a labor dispute.

HERE ENDS ALL OBJECTIONS AND EXCEPTIONS TO GRANTING OR REFUSING INSTRUCTIONS

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[282] THE CLERK: Gentlemen of the jury, have you agreed upon your verdicts?

THE FOREMAN: Yes, sir.

THE CLERK: In the case of L. D. Brown versus Old Dominion Branch No. 496 National Association of Letter Carriers AFL-CIO and the National Association of Letter Carriers AFL-CIO we, the jury, on the issues joined find in favor of the plaintiff and assess his compensatory damages at $10,000.00 (ten thousand dollars) and his punitive damages at $45,000.00 (forty-five thousand dollars) or a total of $55,000.00 (fifty-five thousand dollars). S. H. Flinn, Foreman.

In the case of Roy P. Ziegengeist versus Old Dominion Branch No. 496 National Association of Letter Carriers AFL-CIO and the National Association of Letter Carriers AFL-CIO we, the jury, on the issues joined find in favor of the [283] plaintiff and assess his compensatory damages at $10,000.00 (ten thousand dollars) and his punitive damages at $45,000.00 (forty-five thousand dollars), or a total of $55,000.00 (fifty-five thousand dollars). S. H. Flinn, Foreman.

In the case of Henry M. Austin versus Old Dominion Branch No. 496 National Association of Letter Carriers AFL-CIO and the National Association of Letter Carriers AFL-CIO we, the jury, on the issues joined find in favor of the plaintiff and assess his compensatory damages at $10,000.00 (ten thousand dollars) and his punitive damages at $45,000.00 (forty-five thousand dollars) or a total of $55,000.00 (fifty-five thousand dollars). S. H. Flinn, Foreman.

Gentlemen of the jury, are these your verdicts?

THE JURY: Yes, sir.

THE COURT: Is there any Motion that the jury be polled before being discharged.

MR. RATNER: Yes, Your Honor, we would like to have the jury polled.

THE CLERK: As your name is called [284] please answer whether or not this is your verdict.

NOTE: At this time each juror is polled individually as to whether this is his verdict and each answered in the affirmative.

THE COURT: Is there any further Motion before the jury is discharged? Mr. Ratner, any Motion based on the law of the case usually comes after the jury is discharged.

Gentlemen of the jury, the Court desires to thank you for your service on these cases for these two days. You are now discharged from your services on these three cases and also for the term as jurors.

NOTE: The jury now retire from the courtroom.

THE COURT: Is there any Motion?

MR. RATNER: Yes, Your Honor, the defendants move for judgment notwithstanding [285] the verdict. The judgment is utterly unsupported by the evidence and the law. With respect to the evidence, we submit there is no evidence whatsoever in this record that the publication complained of, and its mailing by the defendant to the homes of its members, tended in any way or in any degree toward violence or a breach of the peace, and consequently it could not conceivably be a violation of the statute on insulting words. For that reason alone, in addition to all the reasons heretofore stated in support of our demurrer; the Motion to strike the plaintiffs' evidence, in support of our Motion for Judgment at the close of all the evidence; in support of our objection to the Court's failure to direct a verdict for the defendants in the first instance; we move that the judgment, notwithstanding the verdict, be entered for the defendants.

THE COURT: Mr. Ratner, the Court, of course with the able assistance of counsel, has had an opportunity to review these questions both on demurrer and within the last week in view of the authority furnished to the Court, and so the

Court feels that no further time will [286] be necessary for it to consider the questions of law which have been raised. So therefore the respective Motions in these three cases are overruled and judgments are entered today on these verdicts with the objections of the defendants noted for the record.

MR. RATNER: To preserve the record, if I may I would like to make a further Motion, that the Court order a new trial in this case for all the same reasons stated previously.

The third Motion is a Motion for remitter, of the amount of the punitive damage award. This rests on separate grounds and is supported by authority cited to the Court heretofore of the Supreme Court of the United States holding that the Supreme Court would not allow a punitive damage verdict in a labor libel case excessive in amount because they can bankrupt the Union. And in my view, the defendants respectively submit that the punitive damage award in each case of $45,000.00 against the compensatory allowance of $10,000.00—which itself is utterly unsupported by the evidence—is totally excessive and constitutionally unpermissible. [287] We ask the Court for a remitter.

THE COURT: Motions overruled.

MR. STEINGOLD: Note our exception.

HEARING CONCLUDED

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PLAINTIFFS' EXHIBIT 2

Change in Branch Meeting

Branch meeting for the month of June will be held on JUNE 13, 1970 at the St. Luke Building (same location as the Branch office) 900 St. James Street at 7:30 P. M.

President's Message

Our local contract leaves a lot to be desired, but there are certain provisions of which we are failing to take advantage. Artilce XII on page eleven of the Local Agreement reads in part as follows: A case written against an employee will not be referred for inclusion in the personnel folder or accepted for other action unless the file shows (1) the immediate supervisor has contacted the employee in writing about the matter, (2) the immediate supervisor has given the employee an opportunity to reply in writing, and (3) the immediate supervisor has informed the employee of his findings, conclusions, and course of action, and he has also informed the employee *in writing* that the files are being sent for inclusion in his official personnel folder.

I have found in dealing with adverse action appeals, that far too many carriers take too lightly the yellow buck slips that are given them to record their answers to some incident. These off hand answers often come back to play an important roll in adverse action hearings.

When you are required to answer in writing, insist that you be informed if your answer is satisfactory, and what the supervisor proposes to do with it. These rights are afforded you under provisions of the Local Agreement; use them.

Another area of the agreement that we fail to take full advantage of is the supplemental agreement dealing with ill or injured employees. It states thusly: The regular or substitute carrier assigned to light-duty shall perform on a route the casing of mail for same day delivery, strapping out of such cased mail, preparing of necessary relays, completing all mark-ups, labeling cases, rewriting carrier books, assisting at facing desk, assisting in processing mark-ups on other routes, performing safety checks on vehicles, assisting supervisors in answering telephones, and receive and investigate patron complaints. The supervisor may assign other light duty with-in the letter carrier craft.

With these provisions in our contract it should not be necessary for carriers to have to change their tour of duty to report to work at 5 P. M. in the evening in order to gain 8 hours employment. With this contract enough work can be found at each station to keep each carrier gainfully employed.

Carrier's Corner

76TH YEAR

Old Dominion Branch — 496

NATIONAL ASSOCIATION OF LETTER CARRIERS

AFL-CIO

RICHMOND, VIRGINIA

900-902 St. James Street
Richmond, Va., 23220
Phone 649-7882

NON-PROFIT ORGN.
U. S. POSTAGE
PAID
Richmond, Va.
Permit No. 1921

Mr. Spencer Davis
1000 Georgia Avenue
Richmond, Virginia 23220

It took a great deal of work by many people to gain these provisions regardless of how meager they are. If the occasion demands, use the contract; it was written to protect you.

The State Convention is being held this year on June 5, 6, & 7 in Alexandria, Va. Because of this our June Branch meeting will be postponed until Saturday, June 13.

L. G. HUTCHINS

Labor-Management Meeting

MAY 13, 1970

Branch 496 Agenda Items

Item No. 1: A discussion on the application of part 774.2 (Quality Step Increase) in the letter carrier craft.

Disposition: The Postmaster is positively promoting the Incentive Awards Program with all employees of the office, and has instructed supervisors to give particular attention to outstanding performance for appropriate recognition.

Item No. 2: The procedure used in placing the names of sick employees on the change action notice.

Disposition: All employees are encouraged to submit to their immediate supervisor the names of co-workers who are sick or hospitalized; such information to be forwarded to the Personnel Office for publication.

Per Capita Tax Due

All members of Branch 496 who are paying dues through the Secretary are advised that their Per Capita Tax is now due. Please mail to: W. W. Manning, 2201 Barton Avenue, Richmond, Va., 23222.

Checks should be made payable to Branch 496, N.A.L.C.

Stylecraft Uniform Co.

Stylecraft Uniform Co. has repeatedly refused to support our Branch endeavors, yet some members still purchase from them. We solicit your cooperation in purchasing only from vendors who support our cause.

The Scab

Some co-workers are in a quandary as to what a scab is; we submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country: a SCAB is a traitor to his God, his country, his family and his class.

LIST OF SCABS

Henry Austin	Richard Leonard
Lewis Bolton	F. E. Moriconi
E. D. Brown	Judson Proctor
L. D. Brown	Wilford Tevis
R. L. Broughman	Hunter Whitlock
R. L. France	R. L. Worsham
Roger Hanson	R. P. Ziegengrist
Randolph Jacobs	

Slow Pitch League

The committee met on May 27, 1970 and the following additional rules were adopted:

11. In the event a player is called out for leaving a base too soon, the runner is out and the ball is declared dead, or no pitch. The batter and all other runners return to their respective bases.

12. A player can only play with one team. Playing with other than your designated team will forfeit game.

13. Homeplate umpire is the official time keeper.

Each home team is requested to furnish an additional ball. (First team listed on schedule is home team.) It is requested that courtesy in manners be extended to spectators and players at all times. Expenditures were listed as follows: $92.00 equipment; $82.00 ½ season salary for two umpires. All participating stations are expected to finalize their financial report at Branch meeting.

STANDINGS

SOUTH-WEST		NORTH-EAST	
Main Office	3-0	Bellevue	3-0
Southside	3-0	East End	1-3
Ampthill	2-1	Lakeside	1-3
Ridge	1-2	Saunders	2-2
Stewart	0-3	West End	0-2

SCHEDULE

JUNE 13, 1970

Ampthill vs. Ridge	6:00 P.M.
Lakeside vs. Stewart	6:00 P.M.
West End vs. East End	7:15 P.M.
Main Office vs. Bellevue	7:15 P.M.

JUNE 20, 1970

Saunders vs. Southside	6:00 P.M.
East End vs. Stewart	6:00 P.M.
Ridge vs. Bellevue	7:15 P.M.
Ampthill vs. Main Office	7:15 P.M.

JUNE 27, 1970

Bellevue vs. Ampthill	6:00 P.M.
Saunders vs. Main Office	6:00 P.M.
Southside vs. East End	7:15 P.M.
Lakeside vs. West End	7:15 P.M.

Branch Picnic

Branch 496 Annual Picnic is scheduled for July 12, 1970 at UP & AWAY DUDE RANCH. Ask your Station Rep. about the *goodies*.

The following Firms have made our Bulletin Possible

BENJ. FRANKLIN PRINTING CO. - 1500 HIGH STREET, RICHMOND, VIRGINIA, 23220

Defendants' Exhibit 3

Constitution

of the

NATIONAL ASSOCIATION OF LETTER CARRIERS

of the

UNITED STATES OF AMERICA

As amended at the Forty-sixth Convention.
Boston, Massachusetts, August 18-24, 1968

WASHINGTON, D. C.
1968

• • • • • • • • •

ARTICLE VII

Nominations and Elections

• • • • • • • • •

Sec. 2. When there is more than one candidate for the same office it shall require a majority of all votes cast for such office to elect, such votes to be by ballot. When there are more than two candidates for any office, the one receiving the lowest number of votes on each ballot shall be dropped until an election is had: Provided, That when there is but one candidate for any office the President may declare his election by consent.

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Defendants' Exhibit 4

By-Laws of Old Dominion Branch No. 496 N.A.L.C.

ARTICLE VIII

Fees, Dues, Fines, and Assessments

• • • • • • • • •

Section 2. Dues in this Branch shall be $60.00 per year and is to be paid in monthly installments of $5.00.

• • • • • • • • •

App. 61

DEFENDANT'S EXHIBIT 5

A SCAB

By JACK LONDON

(Well known author of "Call of the Wild," "Sea Wolf," etc.)

After God had finished the rattlesnake, the toad, the vampire, He had some awful substance left with which He made a scab.

A scab is a two-legged animal with a corkscrew soul, a water-logged brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and angels weep in heaven, and the Devil shuts the gates of Hell to keep him out.

No man has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas Iscariot was a gentleman compared with a scab. For betraying his master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas Iscariot sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The modern strikebreaker sells his birthright, his country, his wife, his children and his fellow men for an unfulfilled promise from his employer, trust or corporation.

Esau was a traitor to himself; Judas Iscariot was a traitor to his God; Benedict Arnold was a traitor to his country; a strikebreaker is a traitor to his God, his country, his wife, his family and his class.

FOR

- ✓ SECURITY
- ✓ HIGHER WAGES
- ✓ PAID VACATIONS
- ✓ EMPLOYEE RIGHTS
- ✓ SENIORITY
- ✓ ADVANCEMENT
- ✓ SAFETY
- ✓ PAID HOLIDAYS

. . . That's why People

STRIKE!

VIRGINIA STATE AFL-CIO
102 North Belvidere Street
Richmond 20, Virginia

Defendants' Proposed Instructions

INSTRUCTION No. A

The Court instructs the Jury:

You are instructed that under the circumstances of this case, the publication complained of is constitutionally privileged and protected against a state law libel action by the Fourteenth Amendment to the Constitution of the United States, as that Amendment incorporates the freedom of press guarantee of the First Amendment, and by the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, as that Clause absorbs and incorporates the guarantee of freedom of press in labor disputes under Executive Order 11491, October 29, 1969, 34 F.R. 17605. You shall therefore return your verdict in favor of the defendants.

Defendants respectfully submit that for the reasons stated and the authorities cited and relied on in their Memorandum In Support Of Affirmative Defenses, filed herewith, this Court is bound to determine and to instruct the jury that on the pleadings, and on the evidence, the published statements complained of may not, in context, constitutionally be construed as statements of fact, except insofar as they truthfully publicize plaintiffs' admitted unique refusal to join or rejoin the Union; that defendants have a constitutional right to publicize their resultant opinions of and feelings about plaintiffs by use of hyperbole, vilification and insulting words, inasmuch as plaintiffs' non-membership substantially injures defendants' important and legitimate economic interests and the ultimate object of the publication was to induce or coerce plaintiffs to join or rejoin the Union; that the designation and descriptions of "scab" in the mailed newsletter, although referring to plaintiffs, were not "addressed," or "directed to" plaintiffs, were not uttered in their presence and were not accompanied by any acts or conduct designed or tending to provoke a violent reaction, and therefore, as a matter of federal constitutional

law, cannot be held to have tended to provoke or incite immediate breach of the peace; and that, as a matter of federal constitutional law, plaintiffs have failed to prove "malice" as that term is correctly defined in the last sentence on page 11 of this Court's opinion letter of January 21, 1971.

If Instruction A is denied or refused, defendants, taking and preserving, and not waiving their objection and exception to such denial or refusal, request the instructions which follow.

INSTRUCTION No. B

The Court instructs the Jury:

You are instructed that defendants Branch 496 on the local level and National Association of Letter Carriers on the national level are the exclusive bargaining representatives of all letter carriers in the Richmond area, non-members as well as members, and that they are required by law to afford equal representation, without discrimination, to non-members and to members of Branch 496.

Letter Opinion, dated January 21, 1971, page 3, top of page.

Executive Order 11491, Section 10(e).

Vaca v. *Sipes*, 386 U.S. 171, and cases therein cited.

INSTRUCTION No. C

The Court instructs the Jury:

You are instructed that the non-membership of eligible workmen in a labor organization, particularly in a labor organization which is required by law to represent them despite their non-membership therein, is not a matter of purely private concern to the worker who refuses to join or withdraws from the Union, but substantially injures the economic interests of the labor organization, its members, supporters and sympathizers, and is commonly considered traitorous to their interests by such persons.

Rosenbloom v. *Metromedia,* No. 66, October Term, 1970, decided June 7, 1971, 39 L.W. 4695, 4698-4702, holding the *New York Times* rule applicable to involvement of private individuals in matters of "public or general interest."

As to the scope of "privileged criticism" even prior to *Austin,* the other recent Supreme Court decisions, see *Restatement of Torts,* Ch. 25, § 606, pp. 277-278:

> "it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged. The fact that the criticism is fantastic is immaterial, and the extravagant form of its expression is unimportant. It is necessary, however, that the comment have some relation to the facts upon which it is made."

Linn v. *Plant Guard Workers,* 383 U.S. 53, 65, holding publication arising out of "labor disputes" governed by the *New York Times* rule.

Senn v. *Tile Layers,* 301 U.S. 468, 478.

Cafeteria Workers v. *Angelos,* 320 U.S. 293; and other cases cited in Point I of defendants' Memorandum In Support of Affirmative Defenses, holding that workers' refusal to join or withdrawal from a union creates or constitutes a "labor dispute."

Cf. opinion letter, pages 9, 11, last paragraph.

INSTRUCTION No. D

The Court instructs the Jury:

You are instructed that a corollary of the right of a workman to refuse to join or to withdraw from membership in a labor organization is the constitutional right of the labor organization to publish such refusal to their members, supporters and sympathizers for the purpose of inducing them to withdraw their good will, friendship and social companionship; that is, socially to ostracize the non-members.

Such exertion of social and moral pressure for the purpose of inducing, forcing or compelling non-members to join or rejoin the union is not motivated by a malevolent desire to injure and is not actionable.

Organization For A Better Austin, et al, v. *Keefe,* No. 137, October Term 1970, 39 L.W. 4577, 4578:

> "The claim that the expressions were intended to exercise a coercive impact on [plaintiffs] does not remove them from the reach of the First Amendment. [Defendant Branch 496] plainly intended to influence [plaintiffs'] conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider v. State,* 308 U.S. 147 (1939); *Thornhill v. Alabama,* 310 U.S. 88 (1940). [Defendant Branch 496 was] engaged openly and vigorously in making the public aware of [plaintiffs' non-union membership. That was] offensive to them, as the views and practices of [Branch 496] are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability."

Authorities cited and discussed in defendants' Memorandum In Support Of Demurrer, pages 5-8, and authorities cited following *Coates v. Cincinnati,* in Point I of Defendants' Memorandum In Support Of Affirmative Defenses.

When the object of an "insulting" publication is to induce or coerce the subject to alter his course of conduct in a matter in which the publisher has a legitimate interest, the publication cannot be held to have been made with "a malevolent desire to injure." *Linn v. Plant Guard Workers,* 383 U.S. 53, 64.

> "* * * [D]efamatory conduct [does not] suffice[] to remove the constitutional shield." *New York Times v. Sullivan,* 376 U.S. 254, 273.

The Court instructs the Jury:

You are instructed that Executive Order 11491, signed October 29, 1969, and effective January 1, 1970, guarantees every employee of the Post Office the "right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization and to refrain from any such activity, and each employee shall be protected in the exercise of this right." Section 1(a). The same Section provides that:

> "The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization."

Section 2(e) of this Executive Order defines "[l]abor organization" as follows:

> "'Labor organization' means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees . . . ."

Both management and labor organizations are prohibited by the Executive Order from interfering with, restraining or coercing any employee in the exercise of the right to join or refrain from joining a labor organization, as set forth above. Sections 19(a)(1) and 19(b)(1).

Exclusive power to enforce and protect this right against violations by either management or labor organizations is vested in the Assistant Secretary of Labor for Labor Management Relations. Sections 6(a)(4), 6(b) and 19(d).

Part 203 of the regulations governing "Labor Management Relations in the Federal Service," which became effective February 4, 1970, upon publication in the Federal Register, 35 F.R. 2561, provide exclusive procedures whereby employees aggrieved by claimed unlawful infringement of their right to join or refrain from joining a labor organization may file a complaint and seek redress from the Assistant Secretary of Labor. (LRX 4461-4464b).

Publication by the Union of the fact of non-membership, for the purpose of arousing the antipathy and ill will of Union members, their supporters and sympathizers, leading to social ostracism of non-members, with the object of thereby inducing, "forcing" or "coercing" the non-members to join, is not "interference," "restraint" or "coercion" within the meaning of the Executive Order.

Defendants' Memorandum In Support Of Demurrer, page 2, note 2 and accompanying text; pages 3-4, 6-8.

Appended hereto are the text of the Executive Order and Regulations referred to.

Last paragraph:

Currier, *Defamation in Labor Disputes,* 53 Va. L. Rev. 1, 24, 31-32.

In re *Textile Workers Union,* 123 NLRB 590, 18 L. ed. 1651, 1665.

International Longshoremen's and Warehousemen's Union, 79 NLRB 1487, 1505.

Cambria Clay Products Co., 106 NLRB 267, 277, enforced in part, modified on other issues, 215 F.2d 48 (6 Cir.).

Matter of *Foster-Lothman Mills,* 20 LRRM 1313 (W.E.R.B., 1947).

Nann v. *Raimist,* 255 N.Y. 307, 318, 174 N.E. 690, 695 (1931).

Wood Mowing & Reaping M. Co. v. *Toohey,* 114 Misc. 185, 191, 186 N.Y.S. 95, 99 (1921).

INSTRUCTION No. F

The Courts instructs the Jury:

You are instructed that you must consider the meaning of the term "scab" in the context of its publication, in this case in a periodical published by a labor uinon and distributed to its regular mailing list. A common, indeed often the primary, dictionary definition of "scab," when the word is used in the labor movement, is "a workman who refuses to join a union." If you find that "Carrier's Corner" used the term "scab" in reference to plaintiffs in this sense, and if you find that plaintiffs had in fact refused to join or withdraw from defendant Branch 496, you must find that the representation was true, and you shall therefor return your verdict in favor of the defendants.

First sentence, letter opinion of January 21, 1971, words must be construed "in the circumstances under which they are uttered."

Second sentence, defendants' request for admissions, and/or proof. See, *e.g., Webster's Third New International Dictionary* (G. & C. Merriam Company, 1965), "scab * * * 4:b(1) one who refuses to join a union"; Webster's New Twentieth Century Dictionary, unabridged, Second Edition (The World Publishing Company, 1968), p. 1614, "scab, n. * * * 5. in the labor movement, (a) a worker who refuses to join a union, or who works for less pay or under different conditons than those accepted by the union."

INSTRUCTION No. G

The Court instructs the Jury:

If you find that the ultimate object of publishing in "Carrier's Corner" that plaintiffs were "scabs," and in defining that term derogatorily, was to induce, persuade, "coerce" or "force" them to join defendant Branch 496, you shall return your verdict in favor of the defendants.

Organization for a Better Austin v. *Keefe, supra;* Defendant's Memorandum in Support of Demurrer, pp. 3-11.

INSTRUCTION No. H

The Court instructs the Jury:

If you find that the definition of "scab" published in "Carrier's Corner" is rhetorical; that is, that it consists of epithets, vilifications, similes, metaphors and hyperboles, and that it was written and has been historically and commonly used by labor unions and their members to express their views and feelings that workmen whom the union and its members consider "scabs" should be shunned or ostracized socially, the purpose or object thereof being to force or compel such non-members to join or rejoin the union, or support and act with the union, you shall return your verdict in favor of the defendants.

Organization For a Better Austin v. *Keefe, supra;*

Cohen v. *California,* No. 299 this Term, decided June 7, 1971, 39 L.W. 4713;

Defendant's Memorandum in Support of Demurrer, pp. 9-15, particularly, *Curtis Publishing Co.* v. *Birdsong,* 360 F.2d 344, 345-348 (5 Cir.), and *R. H. Bouligny, Inc.* v. *United Steelworkers of America, AFL-CIO,* 270 N.C. 160, 154 S.E.2d 344, 356.

INSTRUCTION No. I

The Court instructs the Jury:

If you find that the definition of "scab" in the "Carrier's Corner" publication complained of had long been attributed to Jack London, a recognized literary artist now deceased, and is designated to characterize or epitomize unionists' opinions of or emotions toward workers whom unionists consider "scabs," even though the words and phrases used are epithets and may be considered offensive or "insulting" by the plaintiff, by other non-unionists, or by the public generaly, you are instructed that defendants are entitled to hold and express their opinions and feelings in these terms,

and you shall return your verdict in favor of the defendants.

Cohen v. *California, supra,* "• • • one man's vulgarity is another's lyric," 39 L.W. 4716, and entire third and second paragraphs from end of opinion. *Ibid.*

Coates v. *Cincinnati,* No. 117, October Term 1970, 39 L.W. 4630.

Currier, *Defamation on Labor Disputes,* 53 Va. L. Rev. 1, 32.

Restatement of Torts, §606, *supra.*

INSTRUCTION No. J

The Court instructs the Jury:

Unles you find that the publication complained of was "malicious," as that term is hereinafter defined, you shall return your verdict in favor of defendants. The term "malicious" as used in these instructions does not have reference to any feelings of hostility or ill will against plaintiffs or other non-members of the Union which defendants may have entertained, or to any intent of defendants to injure plaintiffs' reputations or subject them to obloquy, ill will, contempt, ridicule or social ostracism. As a matter of law, a publication is "malicious" only if it is intended to constitute a representation of fact or facts, as distinguished from an expression of feelings, emotions of opinions, and if the representation of fact is actually false, and was known by its maker to be false in fact or was made without regard to concern for its factual truth.

Rosenbloom v. *Metromedia, Inc.,* No. 66, October Term 1970, decided June 7, 1971, 39 L.W. 4694, p. 4697, n. 9 and accompanying text, p. 4702, n. 18 and accompanying text, p. 4703.

Cf. Letter opinion of January 21, 1971, last sentence, page 11.

INSTRUCTION No. K

The Court instructs the Jury:

The burden is on the plaintiffs to prove by clear and convincing evidence that the published definition of "scab" was intended, and would normally be considered in labor circles, to constitute a representation or statement of fact, as distinguished from hyperbole and vituperation, or expressions of opinion or emotion, and that the publication was "malicious," as the word has been defined in an earlier instruction, and unless you find that plaintiffs have met the burden, you shall return your verdict in favor of defendants.

Cohen v. *California, supra.*

Rosenbloom v. *Metromedia, Inc., supra.*

INSTRUCTION No. K

The Court instructs the Jury:

Publication and mailing of the "Carrier's Corner" article complained of was not designed to and did not actually incite the plaintiffs or other readers to immediate acts of violence or breach of the peace. You shall return your verdict in favor of the defendants.

Cohen v. *California, supra,* 39 L.W. 4713, 4714, second column, full paragraph, explicitly hold that the "fighting words" cases like *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, permit illegalization of "a direct personal insult" only when "addressed to" or "directed to the person of the hearer or hearers," thereby foreseeably provoking an immediate violent reaction from him or them. These cases cannot and do not authorize illegalization of "offensive" or "insulting" words which are *not* "addressed to" the person of the hearer, and are not designed to incite or arouse immediate violent reaction from the persons referred to. Cf. *Coates* v. *Cincin-*

nati, supra, 39 L.W. 4630, n. 3, and accompanying text, likewise distinguishing cases where insulting words are *spoken directly to* the addresses, and hence may be found likely to provoke immediate violent reaction.

Cohen also expressly distinguishes, at p. 4714, cases where use of offensive or insulting words is coupled with other "separately identifiable" acts or conduct which the state may regulate. 39 L.W. 4714, last full par., 2nd col., last sentence. It was *such independent conduct*—massing of pickets and their concerted shouting of "scab" at those attempting to work—which was held in *Youngdahl* v. *Rainfair,* 355 U.S. 131, 138, to justify the prohibition. In contrast, here as in *Cohen,* 39 L.W. 4714, the complaint rests exclusively upon the "offensivenes of the *words* [Branch 496] used to convey its message to the public. The only conduct which the [plaintiffs] seek to punish is the fact of communication. • • • [Virginia] certainly lacks power to punish Branch 496 for the underlying content of the communication."

Reliance on *Youngdahl* in the letter opinion of January 21, 1971, p. 11, third paragraph, is now seen to have been misplaced.

If Instruction L is denied or refused, defendants, taking and preserving and not waiving their objection and exception to such denial or refusal request the following Instruction M.

INSTRUCTION No. M

The Court instructs the Jury:

Unles you find that publication and mailing of the publication complained of created a clear and present danger of inciting immediate breach of the peace, you shall return your verdict in favor of the defendants.

Cohen v. *California, supra,* 39 L.W. 4715, 4716-4717, prohibits state law censorship of words deemed "offensive" or

"insulting," either on the theory that they are "inherently likely to cause violent reaction" or on the "more general assertion that the States, acting as guardians of public morality, may properly remove • • • offensive word[s] from the public vocabulary."

INSTRUCTION No. N

The Court instructs the Jury:

Plaintiffs cannot recover any damages without proof that they suffered actual monetary loss in consequences of defendants' publication of the item complained of. Plaintiffs cannot recover for mere embarrassment, "nervousness," or psychological pain or suffering. The burden of proving actual monetary loss is on plaintiffs.

"Would the mere announcement by a state legislature that embarrassment and pain and suffering are measureable actionable losses mean that such damages may be awarded in libel actions?" *Rosenbloom* v. *Metromedia, Inc., supra,* 39 L.W. at 4702. The whole theory that substantial, as distinguished from minimal, damages may be awarded for publications deemed in state law libelous *per se* is contrary to recent controlling Supreme Court decisions.

INSTRUCTION No. O

The Court instructs the Jury:

If you return a verdict in favor of plaintiffs, but find that one or more of the plaintiffs failed to prove substantial actual loss, you shall award such plaintiff only nominal damages. In any event, you shall award only reasonable and not excessive damages.

Rosenbloom v. *California, supra,* 39 L.W. at 4702-4703, n. 19 and accompanying text.

Linn v. *Plant Guard Workers,* 383 U.S. 53, 64-66.

INSTRUCTION No. P

The Court instructs the Jury:

That defendant Branch 496, although affiliated with defendant National Association of Letter Carriers, is a legal entity separate and distinct from NALC and that it is autonomous local labor organization which conducts its own affairs pursuant to its own bylaws. You are further instructed to find that "Carrier's Corner" is published exclusively by conducts its own affairs pursuant to its own bylaws. You are further instructed to find that "Carrier's Corner" is published exclusively by defendant Branch 496, without any actual participation, supervision or control, or any right of participation, supervision or control thereover, in defendant National Association of Letter Carriers, or any officer or agent of said defendant NALC. You are further instructed that it is not sufficient to hold defendant NALC liable for the article appearing in "Carrier's Corner" that Branch 496 and the International had a joint or comon interest in enrolling plaintiffs and other non-unionists as members. Unless you find that plaintiffs have established by clear and convincing evidence that defendant National Association of Letter Carriers, by an authorized agent, actually authorized or participated in publishing the specific article in question, you shall return your verdict in favor of defendant National Association of Letter Carriers.

Rosenbloom v. *California, supra,* 39 L.W. at 4702-4703.

Mine Workers v. *Gibbs,* 383 U.S. 715, 736-737, 738-742.

Currier, *Defamation in Labor Disputes,* 53 Va. L. Rev. 1,41 (para. at top of page).

The Court's Instructions

INSTRUCTION No. 1

The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses and the jury has the right to discard or accept the testimony or any part

thereof of any witness which the jury regards proper to discard or accept, when considered in connection with the whole evidence in the case, but the jury has no right arbitrarily to disregard the credible testimony of a witness. And in ascertaining the preponderance of the evidence and the credibility of witnesses, the jury may take into consideration the demeanor of the witness on the witness stand; his apparent candor or fairnes, his bias, if any; his intelligence; his interest, or lack of it, for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statements by the witness if proved by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, the jury are to determine the credibility of the witnesses and the preponderance of the evidence.

INSTRUCTION No. 2

A verdict must not be based in whole or in part upon surmise, conjecture or sympathy for any of the parties, but must be based solely upon the evidence and the instructions of the Court.

INSTRUCTION No. 3

The term "preponderance of the evidence" does not necessarily mean the greater number of witnesses, but means the greater weight of all the evidence. It is that evidence which is most convincing and satisfactory to the minds of the jury. The testimony of one witness in whom the jury has confidence may constitute a preponderance.

INSTRUCTION No. 4

Under the facts and circumstances of these cases, the statements in question were made upon an occasion known in the law as privileged, and the defendants are not liable for making such statements unless the defendants have abused such privilege.

Under these circumstances, the burden is upon each plaintiff to prove by a preponderance of the evidence that the defendant Old Dominion Branch 496, National Association of Letter Carriers AFL-CIO, which was acting as the agent of the defendant The National Association of Letter Carriers AFL-CIO, circulated defamatory statements in June of 1970 with actual malice and that such defamatory statements, if any, caused him damage. You may not award damages for statements made at other times or other occasions.

The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that such statements were in words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace.

In determining whether or not the language complained of is insulting and tends to violence and a breach of the peace, the words must be construed in the plain and popular sense in which the rest of the community would naturally understand them; that is, they are to be construed according to their usual construction and common acceptation under the circumstances of this case, that is, in a labor dispute.

The term "actual malice" is that conduct which shows in fact that at the time the words were printed they were actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or wilful disregard of the rights of the plaintiff.

In this connection you are told, however, that mere words of abuse indicating that one party dislikes another or that he has a low opinion of him, without more, does not amount to defamation. A certain amount of vulgar name calling, indicating hostility or ill will, under certain circumstances is tolerated by the law.

If you believe that each plaintiff has proven the above elements by a preponderance of the evidence, you shall find your verdict for the plaintiffs, or plaintiff as the case may be, against both defendants and assess the damages in accordance with the instruction on damages.

If the plaintiffs, or any one or more of the plaintiffs as the case may be, has failed to prove his case by a preponderance of the evidence, you shall find in favor of the defendants in such case or cases.

INSTRUCTION No. 5

If you find that a plaintiff is entitled to recover, then in determining the amount of damages to which he may be entitled, you shall take into consideration all the facts and circumstances of the case as disclosed by the evidence, the nature and character of the charges, the language in which they are expressed, the occasion on which they were published, the extent of their circulation, the probable effect upon those to whose attention they came, and their natural and probable effect upon the particular plaintiff's personal feelings; and if under the other instructions herein he is entitled to recover, you should award him such sum as proven by a preponderance of the evidence by way of damages as will fairly and adequately compensate him for the insult, if any, to him, including any pain and mortification and mental suffering inflicted upon him.

INSTRUCTION No. 6

If you find that a particular plaintiff is entitled to recover, and if you believe from a preponderance of the evidence that the acts complained of were inflicted by actual malice, as defined in another instruction of the Court, such plaintiff may in additon to compensatory damages set forth in Instruction No. 5, recover punitive or exemplary damages against the defendants; that is to say, the jury will not be limited in the amount of its verdict, if any, against the

defendants for any compensatory damages sustained by the particular plaintiff, but the jury may award such plaintiff such further damages against the defendants as they may think right, in view of all the circumstances of the case, as a punishment of the defendants and as a salutary example to others, to deter them from offending in a like manner.

In determining whether the defendants are responsible in punitive damages, the jury should consider the relation of the particular plaintiff and the defendants to each other, the acts of the defendants before and after the alleged use of such insulting words, if any, and all the circumstances surrounding them.

INSTRUCTION No. 7

You are told that the form of your verdict shall be as follows:

1. If you find in favor of the plaintiff, and award him compensatory damages only, your verdict should be:

> We, the jury, on the issued joined find in favor of the plaintiff and assess his compensatory damages at $————.

2. If you find in favor of the plaintiff, and award him compensatory damages and punitive damages, the form of your verdict shall be as follows:

> We, the jury, on the issue joined find in favor of the plaintiff and assess his compensatory damages at $———, and his punitive damages at $————, or a total of $————.

3. If you find your verdict in favor of the defendants, the form of your verdict shall be:

> We, the jury, on the issue joined find in favor of the defendants.

NOTE: THE JUDGMENTS ENTERED IN ALL THREE CASES WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED BELOW.

[Caption omitted in printing]

Judgment

This day came again the parties, by their attorneys, and came also the jury sworn in this case, pursuant to their adjournment on yesterday, and having fully heard the argument of counsel were sent out of Court to consult of a verdict, and after some time returned into Court with a verdict in the words and figures following, to-wit: "We, the Jury, on the Issues Joined Find in Favor of the Plaintiff and Assess His Compensatory Damages at $10,000.00 (Ten Thousand) and His Punitive Damages at $45,000.00 (Forty-Five Thousand) or a Total of $55,000.00 (Fifty-Five Thousand)."

Thereupon the defendants, by their attorney, moved the Court to set aside the verdict of the jury and enter final judgment in their favor, or in the alternative to award them a new trial on all issues, on the grounds that the verdict is contrary to the law and the evidence, for misdirection of the jury by the Court because the verdict is excessive, and, for other errors committed by the Court during the course of the trial as noted in the Reporter's Transcript of the evidence, which motions the Court doth overrule.

Therefore, it is considered by the Court that the plaintiff recover of the defendants the sum of Fifty-Five Thousand Dollars with interest thereon to be computed after the rate of six per centum per annum from the 2nd day of July, 1971, until paid, and his costs by him about his suit in this behalf expended.

To which action of the Court the defendants, by their respective attorneys, objected and excepted.

And the defendants having indicated their intention to petition the Supreme Court of Appeals of Virginia for a writ of error from and supersedeas to this judgment, it is

ordered that execution thereon be suspended for a period of four months from this date, and thereafter, if such petition be filed within said time, until the Supreme Court of Appeals of Virginia shall have acted on said petition provided the defendants or someone for them shall within thirty days from this date give a bond in the penalty of Seventy Thousand Dollars, with surety to be approved by the Clerk, conditioned accordingly to Sections 8-465 and 8-477 of the Code of Virginia of 1950, as amended

A Copy,

Teste: LUTHER LIBBY, JR., Clerk.

By /s/ JEAN B. FAYBIE, D.C.

Parker E. Cherry
and
Stephen M. Kapral, p.q.
Costs: $41.25

[Caption Omitted in Printing]

Notice of Appeal and Assignments of Error

Defendants, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, hereby note their respective appeals from the final judgment order entered against them, and each of them by this Court in the above-entitled action on July 2, 1971, and state their intention to file petition for writ of error in the Supreme Court of Virginia.

OLD DOMINION BRANCH No. 496,
NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO and
NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO
Of Counsel

By .....

Assignments of Error

Defendants assign the following as errors of the Trial Court:

1. The Court erred in overruling demurrer filed by both defendants to plaintiff's Motion for Judgment.

2. The Court erred in overruling motions made by counsel for both defendants to strike plaintiff's evidence and to enter summary judgment in favor of the respective defendants when plaintiff rested his case.

3. The Court erred in overruling motions made by counsel for both defendants to strike plaintiff's evidence and to enter summary judgment in favor of the respective defendants after all parties had rested.

4. The Court erred in granting any instructions requested by plaintiff.

5. The Court erred in submitting to the jury any instructions which would have permitted the jury to find its verdict against either defendant.

6. The Court erred in giving the Jury Instructions Numbers 3, 4, 5, 6, and 7.

7. The Court erred in refusing each and every instruction submitted on behalf of the defendants.

8. The Court erred in failing to grant any of the instructions offered on behalf of the defendants, Instructions "A" through "P", inclusive.

9. The Court erred in refusing to permit Executive Order, Defendant's Exhibit "A", to go to the jury.

10. The Court erred in permitting Cynthia Ziegengeist to testify on behalf of the plaintiffs.

11. The Court erred in overruling motions on behalf of both defendants to set aside the verdict of the jury and

enter summary judgment in favor of the respective defendants, or to grant a new trial.

12. The Court erred in overruling motion on behalf of the defendants to grant a remittitur.

OLD DOMINION BRANCH No. 496,
NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO

By .....
Of Counsel

NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO

By .....
Of Counsel

Mozart C. Ratner
818 Eighteenth Street
Washington, D.C. 20006

Israel Steingold
819 Citizens Bank Building
Norfolk, Virginia 23514

Counsel for Defendants

Supreme Court of the United States

No. 72-1180

Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al.,

Appellants,

v.

Henry M. Austin, et al.

APPEAL from the Supreme Court of the Commonwealth of Virginia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for oral argument in tandem with No. 72-617.

May 29, 1973